

Volume: IV  
Pages: 1-148  
Exhibits: None

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

----- x  
JOANNE KOTLER, Individually and as  
Administratrix of the Estate of  
GEORGE P. KOTLER,

Plaintiff,

v.

Civil Action  
No. 86-0810-S

THE AMERICAN TOBACCO COMPANY,  
PHILIP MORRIS, INC. and  
LIGGETT GROUP, INC.,  
Defendants.

----- x  
BEFORE: Honorable Walter Jay Skinner

Held At:

John W. McCormack  
Post Office and Courthouse  
Boston, Massachusetts  
Thursday, February 15, 1990  
9:10 a.m.

\_\_\_\_\_  
DORIS M. JONES & ASSOCIATES, INC.  
Professional Shorthand Reporters  
59 Temple Place  
Boston, Massachusetts 02111  
(617) 542-0039

## 1 APPEARANCES:

## 2 NISSEN &amp; LUMSDEN

3 By Eric Nissen, Esq., Diana Lumsden, Esq.  
4 and Garry V. Inge, Esq.

5 One Court Street  
6 Boston, Massachusetts 02109  
7 For the Plaintiff.

## 8 GASTON &amp; SNOW

9 By Andrew F. Lane, Esq.  
10 One Federal Street  
11 Boston, Massachusetts 02109  
12 For American Brands.

## 13 CHADBOURNE &amp; PARKE

14 By Thomas E. Bezanson, Esq.  
15 30 Rockefeller Plaza  
16 New York, New York 10112  
17 For American Tobacco Company.

18  
19  
20  
21  
22  
23  
24

## I N D E X

## WITNESSES:

ALAN D. HILGENBERG, MD.

(Direct by Mr. Lumsden) 4

(Cross by Mr. Sheffield) 63

(Redirect by Ms. Lumsden) 77

## EXHIBITS:

## DESCRIPTION

FOR IN

ID. EVID.

## P R O C E E D I N G S

THE COURT: Good morning, ladies and gentlemen. I see you've had no problems with the weather.

Are we ready with a witness this morning?

MS. LUMSDEN: Yes, your Honor.

THE COURT: Let's do it.

MS. LUMSDEN: The Plaintiff calls Doctor Alan Hilgenberg.

THE CLERK: Would you raise your right hand, please?

ALAN D. HILGENBERG, M.D.,  
having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

BY MS. LUMSDEN:

Q. Doctor Hilgenberg, I'd ask you to state your full name and for the record spell your last name, if you could.

A. It's Alan Dean Hilgenberg,  
H-i-l-g-e-n-b-e-r-g.

Q. And it's Alan, A-l-a-n, is that right?

1           A.     That's correct.

2           Q.     What is your profession?

3           A.     I'm a thoracic surgeon.

4           Q.     And what is your current hospital position  
5 or affiliation?

6           A.     I work at two hospitals; Massachusetts  
7 General Hospital in Boston and at the Mount Auburn  
8 Hospital in Cambridge.

9           Q.     Do you have any current teaching positions,  
10 Doctor Hilgenberg?

11          A.     Yes. I'm an assistant clinical professor  
12 of surgery at Harvard Medical School.

13          Q.     Could you tell the jury, Doctor Hilgenberg,  
14 something about your educational background  
15 starting, let's say, with your college undergraduate  
16 degree and on to medical school?

17          A.     I was a pre-medical student at my home  
18 state university, which is the University of South  
19 Dakota; and then I went to the University of  
20 Michigan Medical School, graduated there with an MD  
21 degree in 1969, and then I came to Boston and was an  
22 intern at the Mass General Hospital from '69 to '70,  
23 and I did training there in both general surgery and  
24 thoracic surgery, and finished in 1977.

1 Q. During that training, at one point did you  
2 ever become the chief resident at Mass General?

3 A. Yes. I was the chief resident in thoracic  
4 surgery in 1975 and '76.

5 Q. During your training, were you involved in  
6 a particular research fellowship?

7 A. I spent a fellowship for six months at a  
8 chest hospital in Southampton, England, and the bulk  
9 of that experience was devoted to care of patients  
10 who had lung and esophagus diseases.

11 Q. Are you licensed currently to practice  
12 medicine in Massachusetts?

13 A. Yes, I am.

14 Q. And in any other states, Doctor?

15 A. In Michigan and in Colorado.

16 Q. The jury has heard something about board  
17 certification from Doctor Mark.

18 Are you board certified --

19 THE COURT: From Doctor Hilgenberg.

20 MS. LUMSDEN: From Doctor Mark.

21 BY MS. LUMSDEN:

22 Q. They've heard something about how you  
23 become board certified.

24 Are you board certified in any especially?

1           A.    Yes, I am. I'm certified by the American  
2 Board of Surgery, and also by the American Board of  
3 Thoracic Surgery.

4           Q.    You told us about your current academic  
5 teaching positions.

6                   Have you held any other academic or  
7 teaching positions in the past, Doctor?

8           A.    Yes, I have. When I finished my residency  
9 here I took a job in Denver, Colorado and I had a  
10 teaching appointment, a faculty appointment at the  
11 University of Colorado Medical School, and I  
12 practiced there for about four years before  
13 returning to Boston in 1981.

14          Q.    During that time, did you have hospital  
15 appointments in hospitals out in Colorado?

16          A.    Yes, I did.

17          Q.    Could you tell the jury what those were?

18          A.    I was the chief of thoracic surgery service  
19 at Denver General Hospital, which is a city/county  
20 hospital in Denver, and I had appointments at  
21 several downtown Denver private hospitals also.

22          Q.    Doctor Hilgenberg, have you had any  
23 military service?

24          A.    Yes. I was in the Army for two years, 1971

1 through '73. Most of my work in the Army was  
2 devoted to teaching of special forces medics. That  
3 was in the Vietnam era. I was in San Antonio, Texas  
4 at medical field service school.

5 Q. Doctor Hilgenberg, are you a member of  
6 various professional associations and societies?

7 A. Yes. Mainly those related to thoracic  
8 surgery and their associated fields.

9 Q. Can you name a couple of the major, not all  
10 of them, but some of the more important or major of  
11 those?

12 A. Well, the thoracic surgical groups are the  
13 Society of Thoracic Surgeons and the Association for  
14 Thoracic Surgery. I'm a fellow of the American  
15 College of Chest Physicians, member of the American  
16 Medical Association, and a fellow of the American  
17 College of Surgeons.

18 Q. Are you currently involved in any major  
19 research projects?

20 A. Yes. We're doing some interesting work  
21 with carcinoma of the esophagus at the Massachusetts  
22 General Hospital, a radiation therapist and  
23 oncologist, and I have been using a combination of  
24 chemotherapy and surgery and radiation for a very



1       lethal tumor, and actually seem to be making some  
2       progress towards improving the survival rate.

3           Q.     Doctor Hilgenberg, have you written any  
4       articles in the accepted medical literature?

5           A.     I have about 50 journal articles and book  
6       chapters on my curriculum vitae.

7           Q.     And do those include any of the case  
8       records of the Massachusetts General Hospital that  
9       appear in the New England Journal of Medicine?

10          A.     Yes.

11          Q.     Do you know approximately how many of those  
12       you've authored or co-authored?

13          A.     Oh, I think three or five or so.

14          Q.     And you have a number of chapters in  
15       medical textbooks, is that correct?

16          A.     Yes. That's correct.

17          Q.     Approximately how many medical textbook  
18       chapters have you written?

19          A.     I think those are somewhere between twenty  
20       and 25.

21          Q.     Doctor Hilgenberg, how much of your  
22       practice is involved with the treating of patients  
23       with lung cancer?

24          A.     Approximately 30 percent of my work. I

1 deal strictly with surgery of the chest, and that  
2 includes the organs which are the lungs, the  
3 esophagus, and the heart, and I'd say approximately  
4 30 percent is devoted to patients with lung cancer.

5 Q. Did you treat George Kotler?

6 A. Yes.

7 Q. When is the first time that you saw George  
8 Kotler?

9 A. It was in an office visit in September of  
10 1984.

11 Q. Doctor Hilgenberg, you're, I believe, the  
12 first person really that's taken the witness stand  
13 that knew George Kotler.

14 Could you tell the jury something about  
15 him?

16 A. Well, I got to know him over the course of  
17 almost a year and a half. I found him to be a nice  
18 and a gentle man. I think he was honest with me.  
19 He was nervous and frightened, of course, by his  
20 disease.

21 I was impressed by his work ethic. After  
22 we had established the diagnosis of his problem and  
23 given him some treatment, he felt well enough that  
24 he returned to work, and, in fact, continued to work

1       until two or three months before he died. I think  
2       those things made a lasting impression on me.

3               He was concerned about his wife and his  
4       family, and I think he was very much a family man as  
5       well.

6           Q.     Did you meet his wife, Joanne?

7           A.     Yes. She accompanied him on the first  
8       office visit, and then I'd had contact with her  
9       during the subsequent year and a half.

10          Q.     Was she, in your opinion, supportive of him  
11       throughout this disease?

12          A.     Yes.

13          Q.     Doctor Hilgenberg, how was it that you came  
14       to see George Kotler in September of 1984?

15          A.     He was referred to me because his x-ray  
16       showed a mass in his lung, and he was referred by a  
17       general surgeon who had cared for him in the past.

18          Q.     What history, if any, did you have other  
19       than the fact that a mass had been picked up on a  
20       chest film?

21          A.     Well, he had some complaints. He had pain  
22       in the upper part of his back on the right-hand  
23       side, he'd coughed up some blood which alarmed him  
24       and his wife, of course, and he had the abnormal

1 x-rays. So those were all important findings.

2 Q. Why was the pain in the upper part of his  
3 back significant to you?

4 A. Well, it suggested some, perhaps,  
5 involvement of nerves or of the bone in that part of  
6 his body. It was suggestive of something invading  
7 or growing into the structures in his back.

8 Q. Did you look at the chest films of Mr.  
9 Kotler?

10 A. Yes.

11 Q. And were there other chest films ordered  
12 during the course of your treatment of Mr. Kotler?

13 A. Yes.

14 Q. Would it be helpful, Doctor Hilgenberg, to  
15 show the jury the mass on the x-ray films that you  
16 reviewed?

17 A. I'm sure it would.

18 I first saw Mr. Kotler at the very end of  
19 September of 1984, and by the time we had obtained  
20 some additional studies and arranged for an  
21 admission to the hospital to sort this out a bit  
22 more it was into October.

23 But this is a film taken prior to any  
24 treatment measures. You can think of that as if you

1 were looking at me, and this is the right lung and  
2 this is the left lung (indicating).

3 Q. There is a pointer here.

4 A. Can you see that?

5 Okay. We're going to be using a few terms  
6 that we should define right now. This is the  
7 outline of the heart right here, and the aorta. And  
8 this part, the middle part of the chest is referred  
9 to often times as the mediastinum, and it is  
10 basically the space between the two lungs. This  
11 black, large black area here is the right lung, and  
12 this one over here is the left lung. You can, of  
13 course, see the ribs, the collar bones. The  
14 shoulder joints are here. This is the diaphragm  
15 that separates the body of the chest from the  
16 abdomen. This little bubble of gas is the stomach  
17 here. This is the diaphragm on the other side  
18 (indicating).

19 All of these markings in through here are  
20 normal. They are the little bronchial tubes and the  
21 blood vessels that normally supply the lung  
22 (indicating).

23 And the part of this that's abnormal is  
24 this elliptical or sort of oval shaped density right

1 up here. If you compare this part to this part of  
2 the lung, this is what this should normally look  
3 like, some of the bones showing through. These  
4 little strandy vessels are bronchi, but mostly black  
5 or air-filled, clear lung. And here is the mass  
6 (indicating).

7 It's important to notice two or three  
8 things about this. Number one, it's right up  
9 against the middle part of the chest against the  
10 mediastinum. It's not possible really to say  
11 exactly how far over from this x-ray this mass goes  
12 (indicating).

13 As far as masses in the lung go, this is a  
14 large one, it's not small, it's not solid, it's  
15 something that's very obvious on this film.

16 And the other important point is it's the  
17 only abnormal mass that's present in this chest. So  
18 there's only one, and it's a large one, it's in the  
19 lung.

20 Q. Thank you, Doctor.

21 Are there any other films that would be  
22 helpful at this point to show to the jury?

23 A. Well, we have CAT scans, and whether we  
24 want to show those now or a little later --

1           Q.    We'll get into those in a minute.  Thank  
2   you.

3                    Doctor Hilgenberg, did you perform an  
4   examination on Mr. Kotler yourself?

5           A.    Yes.  On numerous occasions.

6           Q.    And as a result of your examination and  
7   history that you had, the x-ray findings that you  
8   had, did you order any further diagnostic studies of  
9   Mr. Kotler?

10          A.    Yes.  They included some additional x-ray  
11   studies, specifically a CAT scan or computerized  
12   tomographic exam of the chest, and then some other  
13   studies as well, scans of his bones and of his liver  
14   and of his brain.

15          Q.    What was the purpose of ordering a CAT  
16   scan?

17          A.    Well, the CAT scan is an x-ray technique  
18   that gives us a lot of additional information beyond  
19   what a chest x-ray would show.  It's a way that a  
20   computer can basically make slices through a body,  
21   and it shows you the cross-section anatomy, and it  
22   provides more detailed information about the lungs  
23   and about the mediastinum, and helps to define  
24   exactly what's going on.

1 Q. Is that the film that you're referring to  
2 which you brought with you today?

3 A. Yes.

4 Q. Would it be helpful at this point to show  
5 the jury your findings on those CAT scans?

6 A. Yes. The film that we just looked at is  
7 virtually actual size. The CAT scans are reduced  
8 somewhat in size. There are a series of images on  
9 each one of these films, and you can just imagine as  
10 if a slice were taken in this direction through the  
11 body, and what one sees then is the front of the  
12 chest right up here up on top. The patient is lying  
13 on his back inside of this imaging machine, the  
14 spine is located back here, this is the right lung  
15 and this is the left (indicating).

16 Again, you can see a pattern there of a  
17 black color that's mainly air within the lung, and  
18 then some little vessels and bronchial tubes there.  
19 And the mass that's in this person's lung is this  
20 large mass right up here, it's the right lung, it's  
21 up near the top (indicating).

22 The other thing to notice here are a lot  
23 of little black air spaces, and these are changes of  
24 emphysema in Mr. Kotler's lungs (indicating).



1           The other part of the CAT scan that's  
2 helpful to us is these views which show the  
3 mediastinum a little bit more clearly than the  
4 lung. They are done with a little bit different  
5 technique on the computer so that you lose a lot of  
6 the detail in the lung. See, that's all black now  
7 and you don't see any of those little bronchial  
8 tubes and arteries anymore. You do see the mass  
9 here in the lung, and again it's a very large one,  
10 and you see some mass here in the middle part of the  
11 chest in the mediastinum.

12           I'm going to use my pen. It's a little  
13 finer than my finger.

14           This black area right here is air within  
15 the windpipe or in the trachea, and this little bit  
16 of air over here is inside of the esophagus, which  
17 is the swallowing tubes. And both of those, of  
18 course, pass down through the middle part of the  
19 chest (indicating).

20           And this area in the mediastinum is  
21 extension or an invasion of the tumor, of the lung  
22 tumor, growing into the middle part of the chest,  
23 and this shows very nicely on this view  
24 (indicating).

1           As you can see, there's much more of the  
2 mass in the lung than there is in the mediastinum.

3           Q.     Thank you.

4           Doctor, you mentioned earlier that you  
5 were a thoracic surgeon, and I don't think I asked  
6 you to define that. If you would.

7           A.     The thorax is a medical word that means  
8 chest, so what it has to do with is the treatment,  
9 particularly with surgical methods of diseases that  
10 involve organs in the chest, heart, lung, esophagus  
11 are the typical ones.

12          Q.     Doctor Hilgenberg, yesterday there was some  
13 reference to a statement that you made in your  
14 deposition in this case with respect to this tumor  
15 arising in the periphery of the lung.

16                 Do you recall that statement?

17          A.     Yes.

18          Q.     Could you explain to the jury what you mean  
19 by the periphery of the lung?

20                 And I do have, if it helps, an anatomical  
21 drawing or x-rays, if you need it.

22          A.     Sure. Well, I'll use that in a moment. I  
23 guess each person who thinks about this may have his  
24 own definition, and I think of central versus

1 peripheral tumors of the lung as follows.

2           The central ones are the ones that are  
3 right up in the main bronchial tubes; in other  
4 words, something that could be easily seen by an  
5 examination with a bronchoscope that we'll discuss  
6 in a bit, and ones that are more peripheral are ones  
7 that arise a little farther out within the substance  
8 of the lung itself. And I will use this diagram.

9           The windpipe or the trachea is shown here,  
10 and that's this structure that you can feel below  
11 your Adam's apple in the neck, and it descends into  
12 the middle part of the chest. And right behind the  
13 upper part of the breast bone, right where this  
14 little angle is here on the breast bone, it divides  
15 into a left and right bronchial tube (indicating).

16           And then once you travel out of it, this  
17 is the root or the pylon of the lung right here  
18 where the bronchial tube goes in and the big  
19 arteries and veins arise. Once you get to that  
20 point, then the bronchial tubes begin to divide and  
21 there's upper, middle and lower lobes on the right  
22 side, and there's an upper and a lower lobe on the  
23 left, and then these continue to divide just like  
24 the branches of the tree until you get out to where

1 the leaves are, and those are the little air sack  
2 parts of the lungs (indicating).

3 So I think of a central tumor as one that  
4 would be within these main bronchial tubes and  
5 within about the first or second divisions of them,  
6 so, in other words, in the trunk and in the very  
7 main branches of the tree, and then once you get  
8 beyond that you have little smaller bronchial tubes,  
9 and eventually out to the little air sacks, and  
10 those are what the substance of the lung are made  
11 out of (indicating).

12 So, again, I think of this man's tumor as  
13 being peripheral, because it was beyond or out in  
14 the lung, beyond where these main bronchial tubes  
15 are located, beyond where I could see with this  
16 bronchoscope.

17 Q. Is there something called a parenchyma?

18 A. The parenchyma is the actual substance of  
19 an organ, and the lung parenchyma, if you will, is  
20 the soft spongy material that the lung is made out  
21 of. It's the small bronchial tube and the air  
22 sacks.

23 Q. Thank you.

24 Doctor Hilgenberg, there was also some

1 reference yesterday to a statement that you made in  
2 your deposition that this tumor arose in the area of  
3 the air sacks. Do you recall that? Or in an air  
4 sack, something to that effect?

5 A. Well, I recall the discussion during the  
6 deposition about that.

7 Q. Could you explain to the jury based on the  
8 size of the tumor that you saw what you mean by  
9 where it arose?

10 A. Well, this is a very large tumor, it is  
11 growing within the substance of the lung, within the  
12 parenchyma of the lung, if you will. It's in the  
13 area where there are both smaller bronchial tubes  
14 and the air sacks. It's not possible to say  
15 precisely where a tumor of this size actually  
16 developed.

17 What I mean by a peripheral tumor or one  
18 that has developed a little bit beyond the main  
19 bronchi is just that, that it's somewhere within the  
20 substance of the lung. But to try to define exactly  
21 which cell, whether it's in an air sack or whether  
22 it's in a bronchial tube, I don't think that's  
23 possible to say because of the size of the tumor.

24 Q. Did you, Doctor Hilgenberg, have Mr. Kotler

1 admitted into a hospital for further diagnostic  
2 work-up after you first saw him?

3 A. Yes. In October of 1984.

4 Q. And I know you mentioned you were on the  
5 staff, is it both the Mount Auburn and the Mass  
6 General Hospital?

7 A. Yes.

8 Q. Was that true in 1984?

9 A. Yes.

10 Q. And Mr. Kotler, living in Cambridge at that  
11 time, it occurs to me why you chose the Mass General  
12 Hospital to admit George Kotler.

13 A. Well, I actually saw him in my office at  
14 Mount Auburn, but I chose to admit him to the Mass  
15 General because the expertise at doing needle  
16 biopsies of the lung is better there, at least was  
17 at that time. There are world class, eminent  
18 pathologists there to establish the appropriate  
19 diagnosis, so that I felt that was better, and the  
20 care of patients with lung problems is better and  
21 it's more streamlined there as opposed to Mount  
22 Auburn.

23 So those were my reasons for choosing that  
24 hospital.

1 Q. Do you know Doctor Eugene Mark?

2 A. Yes, I do.

3 Q. Are you including him in your description  
4 of the world class pathologists at the Mass General?

5 A. Yes.

6 Q. Doctor Hilgenberg, he did have a needle  
7 aspiration biopsy performed, I believe it was on  
8 October 24th of 1984, is that correct?

9 A. Yes.

10 Q. And where was this needle aspiration biopsy  
11 performed?

12 A. It was done in the x-ray department. For a  
13 peripheral tumor like this in the lung, usually the  
14 best way to approach it, to obtain a little sample  
15 of it, to find out exactly what it is is to do a  
16 needle biopsy. It's done by a radiologist who  
17 specializes in this particular procedure, and the  
18 patient is awake. There's some local anesthesia  
19 injected into the skin, the area is localized under  
20 a fluoroscope, an x-ray imaging machine, and then a  
21 needle is inserted through the skin into the tumor  
22 in the lung, its position is confirmed by the  
23 fluoroscope, and then a syringe is applied in the  
24 needle, and bits of tissue are obtained, and then

1 they are examined by the pathologist.

2 Q. Did you receive the results of that needle  
3 aspiration biopsy on Mr. Kotler?

4 A. Yes.

5 Q. Did you receive those in a written form or  
6 over the telephone? How did that occur?

7 A. Both actually. In order to try to expedite  
8 his care I received an initial report over the  
9 telephone, and then, of course, written reports  
10 arrived within a few days.

11 Q. What were the results of that needle  
12 aspiration biopsy that you received?

13 A. Well, they showed that George Kotler had a  
14 lung cancer.

15 Q. Did it tell you in the results either on  
16 the phone or in the report the cell type of that  
17 carcinoma of the lung?

18 A. Yes, it did. The report specifically  
19 stated large cell poorly differentiated carcinoma.

20 Q. And to you did that identify the cell type?

21 A. Yes. That's one of the common cell types  
22 of lung cancer.

23 Q. Do you regularly review such pathology  
24 reports as part of your practice as a thoracic



1 surgeon?

2 A. Yes, I do, on virtually a daily basis.

3 Q. Can you give us some idea of how many such  
4 pathology reports come across your desk?

5 A. Well, at least two or three a week.

6 Q. Would it be fair to say hundreds?

7 A. Sure.

8 Q. Is the psychologist or pathologist in your  
9 experience, Doctor Hilgenberg, always able to  
10 identify the cell type?

11 A. Not always.

12 Q. Will the radiologist in your experience  
13 ever state in his or her report that they are unsure  
14 of the cell type?

15 A. Yes. The pathologist and the cytologist.  
16 I have extensive experience with the group at Mass  
17 General, so I won't comment about those and other  
18 hospitals, but they are conservative, and when they  
19 say a specific cell type they are accurate in the  
20 overwhelming majority of cases. And the reason for  
21 that is that they only say that if they are  
22 certain. And I see reports where they will say  
23 "malignant cells present, unsure of the type." It's  
24 just plain English on their reports like that.

1           So when they come out on a report as in  
2 George Kotler's case and state very definitely a  
3 cell type, that's something that I have every  
4 confidence in as being accurate. If they don't feel  
5 convinced of that they will give a report that is  
6 different, they'll say malignant cells present, or  
7 then they may say questionable malignancy there,  
8 there are all of these things that are very easy for  
9 a person like me who's reading these reports to  
10 interpret.

11           Q. Doctor Hilgenberg, are you familiar with a  
12 type of carcinoma entitled the bronchoalveolar  
13 carcinoma?

14           A. Yes.

15           Q. How common is that type of carcinoma in  
16 your experience?

17           A. It's a rare type. Probably one or two  
18 percent of all patients who have lung cancer.

19           Q. Do you have an opinion with a reasonable  
20 degree of medical probability as to whether or not  
21 that's the type that Mr. Kotler had?

22           A. Yes, I have an opinion.

23           Q. And what's your opinion?

24           A. My opinion is that he did not have that

1 type of lung cancer.

2 Q. Doctor Hilgenberg, did you ask for a  
3 radiation therapy consultation at some point?

4 A. Yes.

5 Q. And why did you do that?

6 A. I felt that would be the best way of  
7 treating Mr. Kotler with his type and stage of  
8 tumor.

9 In lung cancers that are smaller and that  
10 are surrounded by the lung and haven't spread or  
11 metastasized anywhere, we try to remove them  
12 surgically if possible. I felt that at the time  
13 that we finished evaluating him initially that this  
14 tumor was involving the mediastinum, the middle part  
15 of the chest, in an area that would be difficult, if  
16 not impossible, to remove surgically.

17 So my initial treatment plan was to have  
18 radiation treatments administered to see if the  
19 tumor could be shrunken, and then re-evaluate him  
20 after about a 50 percent of a course of radiation  
21 treatment was given, and see whether surgery might  
22 be possible a few weeks later.

23 So I did consult with Doctor Noah Choi of  
24 the radiation therapy department of Mass General

1 Hospital, and he did have a course of radiation  
2 treatments between October and December of 1984.

3 Q. You mentioned, Doctor Hilgenberg, that some  
4 of this tumor involved the area of the mediastinum.

5 In your opinion, was this a lung tumor  
6 that spread into the mediastinum, or was it a  
7 mediastinum tumor that spread into the lung?

8 A. My opinion is that it was a lung tumor that  
9 spread to the mediastinum. There was a larger  
10 component in the lung than there was in the  
11 mediastinum, and it's very common for lung tumors to  
12 metastasize or spread directly into the  
13 mediastinum. It's less likely for mediastinal  
14 tumors to travel the other way, although it's  
15 possible. But it's certainly my opinion that this  
16 was a lung tumor that involved the mediastinum.

17 Q. After the October, '84 admission of Mr.  
18 Kotler into the Mass General, did you have him  
19 admitted again that year?

20 A. Yes. We admitted him again in December of  
21 1984 to evaluate the response to the radiation and  
22 to consider him for the possibility of surgical  
23 removal of the tumor.

24 Q. And what were the results of your

1 evaluation of the response to the radiation?

2 A. Well, it was at that time a minimal  
3 response. We repeated his CAT scan and saw that it  
4 was not much smaller at all, and then I took him to  
5 the operating room and did an examination under  
6 anesthesia that involved looking into the windpipe  
7 and the bronchial tubes, this procedure's called  
8 bronchoscopy, and also looking into his esophagus.

9 And at that time we determined that the  
10 part of the tumor that was growing into the  
11 mediastinum was actually involving the walls of the  
12 esophagus and of the trachea, and therefore it just  
13 made the possibility of surgery unlikely to be able  
14 to be done. In other words, he was inoperable at  
15 that time.

16 Q. Could you explain a little bit to the jury  
17 about how you did this bronchoscopy, what the  
18 instrument was you used, exactly how you do it?

19 A. Sure.

20 There are two types of bronchoscopes that  
21 we commonly use, one is called rigid and the other  
22 one is flexible.

23 The rigid one is a metal tube, it's about  
24 three-quarters of an inch in diameter, it has a

1 light at the end of it, and it's an instrument  
2 that's about this long, two and a half feet in  
3 length. And it's inserted through the mouth, the  
4 patient's anesthetized, in this case we used a  
5 general anesthesia, it passes through the mouth,  
6 through the larynx, through the vocal cords down  
7 into the windpipe, and one can examine both the left  
8 and the right bronchi.

9 Then there was a similar instrument that  
10 we used in the esophagus. There is another type of  
11 bronchoscope that's called a flexible one. It's  
12 made with fiber optics. It also goes through the  
13 mouth, or the nose for that matter, it's a little  
14 smaller, perhaps it can look just the tiniest little  
15 bit farther out into the bronchial tubes than the  
16 rigid instrument, but not very much farther.

17 Q. Were you actually able to see this mass?

18 A. Well, I saw the mass pushing on the trachea  
19 and pushing on the esophagus, and in that sense I  
20 would say yes. But the mucous membrane lining of  
21 both the trachea and the esophagus were intact and  
22 normal.

23 So I saw the mass through this normal  
24 mucous membrane that lines the trachea and the

1 esophagus.

2 Q. Based on your findings, Doctor Hilgenberg,  
3 why in your opinion was he an inoperable candidate  
4 at that point? I know you mentioned because it  
5 impinged on the trachea and esophagus, but why would  
6 that make him inoperable?

7 A. Well, we know from plenty of historical  
8 experience with surgery for lung cancer that removal  
9 of part of the tumor won't help the patient, it  
10 won't cure the patient, and it probably won't even  
11 prolong his life.

12 So what we try to do in selecting patients  
13 for surgery is to pick those where we have a chance,  
14 a reasonable chance of being able to completely  
15 remove the cancer.

16 I had established that it was growing into  
17 the wall of the esophagus and growing into the wall  
18 of the windpipe, and it's just not possible to be  
19 able to take out those structures and to try to put  
20 them back together again along with a part of the  
21 lung.

22 So from the CAT scan and from the  
23 bronchoscopy that we did it was clear that this  
24 tumor, if I were to operate on it, could only be

1 partially removed, and that wouldn't help the  
2 patient, and that would have to put him through a  
3 very big operation, so that's why he's inoperable.

4 Q. Doctor Hilgenberg, Doctor Mark mentioned  
5 that there are some cellular changes that take place  
6 on the way to cancer, medioplasia, dysplasia, things  
7 like that.

8 Are you able to visualize any of those  
9 types of changes with the bronchoscope?

10 A. No. Those are changes that the pathologist  
11 sees under a microscope in a biopsy specimen. The  
12 biopsies could be obtained through the bronchoscope  
13 tube. To the surgeon looking through the  
14 bronchoscope, those changes are not visible.

15 Q. Did you examine both lungs at the time of  
16 this bronchoscopy?

17 A. Yes. Both of the bronchial tubes to both  
18 lungs, yes.

19 Q. What were your findings as to the other  
20 lung?

21 A. Well, the left bronchial tubes were normal,  
22 and, in fact, the main abnormality at the  
23 bronchoscopy was on the right-hand side of the  
24 trachea where the tumor was pushing in on it.



1 Q. Is it more common to see a primary lung  
2 tumor in one or the other of the two lungs?

3 A. Oh, some studies show that the right lung  
4 is a little bit more common than the left. I think  
5 the reason for that is it's a little larger than the  
6 left. The heart protrudes more towards the left  
7 side, as you've seen on the x-rays the left lung is  
8 a little smaller, but they are almost equal for  
9 practical purposes.

10 Q. Doctor Hilgenberg, do you have an opinion  
11 with a reasonable degree of medical certainty as to  
12 whether or not this tumor was primary to the lung as  
13 opposed to being metastatic from some other primary?

14 A. Yes, I do.

15 Q. What's your opinion?

16 A. Well, my opinion is that it is a primary  
17 cancer of the lung, and I base that on several  
18 factors.

19 One is that it is a large tumor in the  
20 lung. The second factor is that it is a single area  
21 in the lung. Many, if not most, of the metastatic  
22 tumors to the lung are in multiple areas, not just  
23 one.

24 I also base it on the fact that there was

1 no sign of a primary tumor in any other part of his  
2 body.

3 Q. When you say that there was no finding of  
4 any other primary tumor in another part of his body,  
5 were there any tests, diagnostic tests, that were  
6 done that gave you some information about that?

7 A. Well, there were several. One is just a  
8 history and talking to the patient and finding out  
9 what kind of symptoms there were, and he had  
10 symptoms only referable to his lung as we  
11 discussed.

12 On his physical exam to examine the  
13 various parts of his body, we did not find any lumps  
14 or abnormalities in other places.

15 He had on both of these MGH hospital  
16 admissions rectal exams. There were no tumors  
17 palpable in his rectum.

18 And he also had examinations of his stool  
19 on both of those times for blood, for microscopic  
20 traces of blood, and none was found on either of  
21 those two occasions.

22 He had a scan of his bones, and we did not  
23 find any bone cancer.

24 He had a liver scan, and we didn't find

1 evidence of liver cancer.

2 He had a CAT scan of his brain, and we did  
3 not find evidence of cancer in his brain.

4 So he had extensive evaluations for  
5 possible primaries in other places, and none were  
6 found.

7 Q. Why was it significant with respect to  
8 ruling out another primary that he had a negative  
9 rectal exam and no blood in his stools?

10 MR. SHEFFLER: Your Honor,  
11 objection.

12 If it may shorten up the examination,  
13 the Defendants are not contesting that Mr. Kotler  
14 had a primary lung cancer.

15 THE COURT: Does that save you time?

16 MS. LUMSDEN: It certainly does.

17 THE COURT: Okay. Press on.

18 BY MS. LUMSDEN:

19 Q. Doctor Hilgenberg, did you stage this  
20 tumor?

21 A. Yes.

22 Q. And what stage was this tumor?

23 A. Well, I staged it as a stage 3B.

24 Q. Would you explain that?

1           A.    Of course if we're going to use that we  
2           need to describe the staging system.

3                   Let me make a few notes on the chalkboard,  
4           if I could.

5           Q.    Sure. We can bring it up a little closer  
6           for you, Doctor, unless you feel that you can --

7           A.    All right. The staging system that is well  
8           recognized is one that's been developed by a group  
9           called the American Joint Commission On Cancer  
10          Staging, and it involves a look at the primary tumor  
11          and the possible sites of spread or metastasis of  
12          the tumor. And it basically has to do with the size  
13          of the primary tumor, and whether or not it spread  
14          to some other sites.

15                   And it's called often times the TNM  
16          system. T stands for tumor. N for nodes, and nodes  
17          are the same thing as we think of as glands, lymph  
18          glands, and when you're a child and you have a sore  
19          throat and the glands in your neck enlarge, that's  
20          what we're talking about. Those glands or nodes are  
21          located throughout the body and, in fact, the  
22          mediastinum or middle part of the chest is a site  
23          where many lymph nodes are normally found in all of  
24          us.

1           The tumor designation is easy, and it just  
2 goes from one, two, three and four, and it basically  
3 has to do with the size of the tumor.

4           The T-1 types are very small, and they are  
5 typically under three centimeters or about an inch  
6 in size. So we'll say less than three centimeters.

7           The T-2 are larger than three centimeters  
8 but they are completely surrounded by lung. So, in  
9 other words, they are still a nice, round nodule  
10 that you can see on an x-ray, black, air-filled lung  
11 all around it.

12           The T-3 tumors actually grow into some  
13 other structure in the chest such as a rib or a  
14 diaphragm or even the mediastinum. So these are  
15 beginning to invade other structures against the  
16 lung inside of the chest.

17           And then the four, T-4 ones are ones that  
18 have actually grown right into other organs such as  
19 the heart or the windpipe or the esophagus, as in  
20 this case, so these are even more evasive.

21           So Mr. Kotler's, on the basis of the scans  
22 and the bronchoscopy, was the T-4.

23           The nodes are fairly simple, there's N-1  
24 and N-2. There are some lymph nodes that are

1 located right up adjacent to the lung itself, and  
2 those are the N-1 nodes. And then there are N-2  
3 nodes that are in the mediastinum, and those are the  
4 ones that are right up in the middle part of the  
5 chest.

6 The M stands for metastasis, and that  
7 means metastasis to organs that are far away from  
8 the lung, such as the liver or brain or a bone.  
9 That's either zero or one.

10 And then you put all of these things  
11 together and stage the tumor as to stage one, which  
12 is the earliest, stage two, stage three, or stage  
13 four, and the three have an A and a B subcategory.

14 He had a T-4 tumor and possibly N-2 nodes,  
15 although we didn't actually biopsy them, so this is  
16 just not entirely clear, but whenever a person has a  
17 T-4 tumor he falls into this category (indicating).  
18 The stage one is the smallest tumor, these are the  
19 T-1-NO, and T-2-NO ones, stage two are the little  
20 advanced ones, stage three are the farther advanced  
21 still, and stage four are the ones that have distant  
22 metastases.

23 And the implication of all this is a small  
24 tumor that hasn't spread anywhere is very likely to

1 be cured. A large tumor that's invaded something  
2 like the heart or has metastasized to another organ  
3 like the liver, there isn't anything under our  
4 current methods of treatment that can allow survival  
5 of that patient.

6 So with the staging here of something in  
7 this category, 3-B, in Mr. Kotler we're looking at a  
8 cancer that he will die from because it was already  
9 too far advanced at the time that it was discovered,  
10 and treatment that we were able to do for him is  
11 strictly to try to shrink the tumor to make him more  
12 comfortable, perhaps to extend his life a bit. But  
13 with the kind of staging that we have, he was an  
14 incurable case from the time that we established the  
15 diagnosis.

16 Q. Doctor Hilgenberg, when do you determine  
17 when the survival period begins in terms of a lung  
18 cancer patient?

19 A. Well, it's usually begun at the time that  
20 the diagnosis is made; in other words, from the time  
21 that the biopsy was taken.

22 Q. And in this case, Mr. Kotler lived  
23 approximately fifteen months after October of 1984.

24 For this stage of cancer, was that typical

1 for such a patient?

2 A. Yes, that's typical.

3 Q. Doctor Hilgenberg, Mr. Kotler had a chest  
4 x-ray in May of 1984.

5 Do you recall that?

6 A. Yes.

7 Q. Did you look at that chest x-ray?

8 A. I looked at that at the time that I saw him  
9 for the first office visit in September of '84.

10 Q. And was the tumor visible on that x-ray?

11 A. In retrospect I thought it was, although  
12 the radiologist who read that x-ray did not comment  
13 on it. But putting up the September film and the  
14 May film, they looked very similar to me.

15 Q. And, in fact, was the radiologist the same  
16 radiologist that looked at both films, if you  
17 recall?

18 A. I don't recall that.

19 Q. Doctor Hilgenberg, do you have an opinion  
20 with a reasonable degree of medical certainty as to  
21 whether or not if this tumor had been picked up in  
22 May of 1984 whether it would have made any  
23 significant difference for George Kotler in terms of  
24 his outcome?



1 A. Yes, I have an opinion.

2 Q. What is that?

3 A. Well, it was a four month interval, and it  
4 looked like there was very little change in its  
5 appearance on the chest x-ray, and my opinion is  
6 that it would not have made any difference for his  
7 ultimate survival or cureability had it been  
8 diagnosed and treatment started in May as opposed to  
9 September.

10 Q. You mentioned that you found on viewing the  
11 chest x-rays and CAT scans of Mr. Kotler that there  
12 were signs of emphysema, is that correct?

13 A. Yes.

14 Q. In your opinion, what are the common causes  
15 of emphysema?

16 A. Well, by far and away the most common cause  
17 is smoking cigarettes.

18 Q. In your opinion, was that the cause in  
19 George Kotler's case?

20 A. Yes.

21 Q. Doctor Hilgenberg, was it ever documented  
22 that Mr. Kotler had any distant metastasis at all?

23 A. No, it was not.

24 Q. Was this a common way for a primary lung

1 tumor to act, namely aggressive locally versus a  
2 distant metastasis?

3 A. Yes, it is a common way. Some lung tumors  
4 get into the bloodstream or into the lymphatic  
5 vessels and travel to distant parts of the body, but  
6 others of them can stay more confined to the chest  
7 and invade there locally and do all their  
8 destructive damage and even result in a patient's  
9 death, as it did in this case, with just extensive  
10 involvement of the lung and of the heart and the  
11 areas in the chest, and that's a relatively common  
12 way for lung cancers to behave.

13 Q. Are there some lung tumors, in your  
14 experience, that are more aggressive in growth than  
15 others?

16 A. Yes.

17 Q. And how would you characterize the growth  
18 of this particular tumor?

19 A. Well, I would call this a moderately  
20 aggressive tumor locally.

21 Q. Mr. Kotler was admitted into the  
22 Massachusetts General Hospital in November of 1985,  
23 is that correct?

24 A. Yes.

1 Q. What was the reason for his admission at  
2 that point?

3 A. Well, he was failing at that time. This  
4 was a year after the diagnosis and treatment, and he  
5 had a pneumonia in his right lung. He was having  
6 trouble breathing, he was coughing, he was losing  
7 weight. And he was admitted because of difficulty  
8 breathing, a fever and a pneumonia in the right  
9 lung.

10 Q. Did you have an opinion at the time as to  
11 the cause of the pneumonia?

12 A. Yes.

13 Q. What was that?

14 A. Well, the obvious natural history that I've  
15 just described for an advanced tumor like this with  
16 radiation treatments, it shrunk and he felt better  
17 for a while, but in no sense is that ever considered  
18 a curative treatment for this.

19 So the tumor unfortunately regrew in the  
20 area of the right lung, it caused obstruction of the  
21 bronchial tubes, and then because of that the normal  
22 mucous and secretions in the lung couldn't travel  
23 out to the main part of his airway. And so then  
24 when there's a back-up behind an obstructing tumor

1 an infection often times develops, and an infection  
2 in the lung is called pneumonia.

3 Q. There's also a mention in that hospital  
4 admission of something called atrial fibrillation.  
5 What is that?

6 A. Well, that's an irregularity of the heart.  
7 It's a heart rythm disturbance.

8 And normally our hearts beat at a nice  
9 regular rate and rythm, and atrial fibrillation is  
10 a fairly common rapid and irregular heartbeat.  
11 People feel palpitations sometimes when that  
12 develops, and it is often times due to some kind of  
13 irritation of the surface of the heart.

14 And so when he was admitted he had an  
15 abnormal pulse to feel and to listen to, and his  
16 electrocardiogram showed this rapid irregular  
17 heartbeat that we all atrial fibrillation.

18 Q. Did you have an opinion at that time as to  
19 the cause of that?

20 A. Well, putting this all together it goes  
21 along with the cancer growing into his heart or at  
22 least to the surface of it. The sack that surrounds  
23 the heart is called the pericardium, and this is  
24 very commonly involved with lung cancers, and then

1 as it starts to grow up against the wall of the  
2 heart it can cause enough irritation to make his  
3 heart rate fast and his rythm irregular.

4 Q. Doctor Hilgenberg, Mr. Kotler was again  
5 admitted into the Mass General Hospital in December  
6 of 1985. What was the purpose of that admission?

7 A. Well, that was right at the end of his  
8 life. It was again a problem with continuing  
9 difficulty breathing and infection in the right  
10 lung.

11 Q. Did you bring any other films with you,  
12 Doctor Hilgenberg, that would be demonstrative at  
13 all to the jury during any of this period of time?

14 A. There is a film from that time, from  
15 December of 1985.

16 Again, this is a plain chest x-ray, it's  
17 as if you were looking at me. This is the right  
18 lung, this is the left, and you can see that there's  
19 a very large dense area up here in the upper part of  
20 the right lung, in fact with an air fluid level  
21 right here suggesting very strongly that there was  
22 probably some pus material trapped behind this tumor  
23 in the upper part of his right lung (indicating).

24 And you can see that there's a lot more

1 haziness now along this side here in the right lung  
2 adjacent to the heart, and that certainly goes along  
3 with this infiltrating or growing tumor that was  
4 involved in this side of his heart causing that  
5 irregular rythm (indicating).

6 So it's much more of a progression of his  
7 disease here than we saw on those initial films from  
8 the year before.

9 Q. Doctor, this white area here, is that all  
10 tumor or is that something else?

11 MR. LANE: Objection.

12 A. I think some of it is tumor and some of it  
13 is pneumonia, this white area here (indicating).

14 BY MS. LUMSDEN:

15 Q. Thank you, Doctor.

16 Any other films that you have in terms of  
17 being demonstrable to the jury at this point?

18 A. No.

19 Q. Thank you.

20 Doctor Hilgenberg, as part of your  
21 practice, do you commonly inquire into the possible  
22 causative factors of a patient's lung cancer?

23 A. Yes.

24 Q. Are there procedures commonly accepted

1 among clinicians in trying to find out those  
2 factors?

3 A. Yes.

4 Q. What are those things that are customarily  
5 asked about the patient?

6 A. Mainly it's asking the patient, obtaining a  
7 history of exposures. And smoking exposure is a  
8 very important one, and to obtain an occupational  
9 history is another. And we often times ask about  
10 exposure to asbestos, and if a person knows of  
11 exposure to radioactive materials.

12 For example, in Colorado people were  
13 mining for uranium, and so that was an important  
14 question to ask.

15 So there are a number of things that need  
16 to be asked in evaluating this kind of problem and  
17 trying to figure out the cause of it.

18 Q. Why do you ask about smoking?

19 A. Well, it's the number one cause of lung  
20 cancer.

21 Q. Doctor Hilgenberg, can you give the jury  
22 some idea of how long physicians have been asking  
23 patients about smoking histories?

24 A. Well, I'm at least aware of indications in

1 the medical literature that it's been done since the  
2 late 1930s.

3 Q. Was there anything significant to you in  
4 terms of any work exposures that Mr. Kotler had?

5 A. No.

6 Q. Did you get a smoking history from Mr.  
7 Kotler?

8 A. Yes.

9 Q. And what was that history?

10 A. That he had smoked approximately one and a  
11 half packs of cigarettes per day for 40 years.

12 Q. Was that a significant smoking history in  
13 your opinion?

14 A. Yes. That's a significant smoking history.

15 Q. Did you at any time during your treatment  
16 of George Kotler advise him to stop smoking?

17 A. Yes, I did.

18 Q. Do you advise all of your patients to stop  
19 smoking, if they are smokers?

20 A. Yes.

21 Q. Why?

22 A. Well, a certain amount of smoke related  
23 illness can be diminished if a person stops  
24 smoking. Things that I'm thinking about are damage



1 to the lung that would result in emphysema, a  
2 certain amount of that is reversible, and the risk  
3 of lung cancer diminishes in people who stop smoking  
4 as time passes. So whatever could be reversible  
5 will be.

6 And I advise all my patients who smoke to  
7 stop smoking.

8 Q. Doctor Hilgenberg, even if George Kotler  
9 continued to smoke after October of 1984, in your  
10 opinion did that significantly effect the outcome  
11 for Mr. Kotler?

12 A. No. It wouldn't have any significant  
13 influence on it. Unfortunately the cancer was  
14 already there and it was an incurable one at the  
15 time. So whether he stopped or not would not have  
16 made a major impact on his survival.

17 I told him to stop because initially  
18 because I thought it would help to cut down some on  
19 his coughing and on his secretions. And at least  
20 early on we were considering him for the possibility  
21 of surgery, and we know that people who continue to  
22 smoke right up until the time of their surgery are  
23 at much more risk of pneumonia in the early period  
24 after an operation, so I really insist on people

1       being off cigarettes for several weeks prior to a  
2       lung operation.

3           Q.     And did Mr. Kotler do that?

4           A.     As far as I know he did.

5           Q.     Doctor Hilgenberg, do you have an opinion  
6       with a reasonable degree of medical certainty as to  
7       the cause of George Kotler's lung cancer?

8           A.     Yes.

9           Q.     And what's your opinion?

10          A.     Well, my opinion is that it was due to his  
11       cigarette smoking.

12          Q.     And what's the basis of that opinion?

13          A.     Well, there's several factors.

14                 One is teaching that I received in medical  
15       school, and that was in the later half of the  
16       1960s. Our lectures in pathology and in internal  
17       medicine and thoracic surgery very clearly told us  
18       about lung cancer being caused by cigarette smoking.

19                 A second factor is my reading of the  
20       medical literature. They include things like the  
21       Surgeon General's report on smoking and health, but  
22       they also include the standard journals, Journal of  
23       the American Medical Association, New England  
24       Journal of Medicine. There are very commonly

1 articles in there that deal with the issues of  
2 smoking causing lung cancer.

3 They also have to do -- this opinion also  
4 has to do with my regular attendance at conferences  
5 at the Mass General Hospital that are lung pathology  
6 conferences where there are radiologists with  
7 x-rays, pathologists, surgeons, pulmonary medicine  
8 specialists who all discuss individual cases  
9 together, and there's very strong evidence from  
10 those conferences that this is a problem, and my own  
11 experience is an important part of this.

12 I reviewed for purposes of this discussion  
13 my experience with patients with lung cancer during  
14 the calendar year 1989. So just this past year I  
15 treated 67 patients with lung cancer, only three of  
16 those 67 were non-smokers, and all of the others  
17 were substantial cigarette smokers.

18 So there's a variety of reasons that I  
19 base this opinion on.

20 Q. Doctor, do your own personal statistics, to  
21 your knowledge, agree with the overall statistics of  
22 the percentage of lung cancer patients who are  
23 smokers?

24 A. Yes, they do. It's estimated to be 85 to

1 90 percent of lung cancers are due to cigarette  
2 smoking.

3 Q. What are the other causes, to your  
4 knowledge, of lung cancer?

5 A. Well, asbestos exposure is implicated. It  
6 is a little bit difficult sometimes to sort out  
7 exactly how important some of these other features  
8 are because many, if not most, of the patients have  
9 been cigarette smokers also.

10 But it seems clear that asbestos is a  
11 potential cause of lung cancer, radiation may be,  
12 and we occasionally see non-smokers who have them,  
13 and they are usually quite elderly, people who are  
14 in their late seventies or in their eighties, and  
15 occasionally people who have problems with their  
16 immune systems such as forms of leukemia and perhaps  
17 patients with AIDS could develop lung cancers in the  
18 absence of smoking.

19 Q. Did Mr. Kotler have any evidence of any  
20 immunological factor causing his lung cancer?

21 A. No, he didn't.

22 Q. Doctor Hilgenberg, have you ever seen a  
23 patient in your own practice with a large cell  
24 carcinoma of the lung who was not a smoker?

MNAT 00011748

1           A.    No, I've not.

2           Q.    Is lung cancer rising or decreasing in  
3 America?

4           A.    Well, the incidence of it is still  
5 increasing.

6           Q.    And how long has it been on the rise?

7           A.    It's probably been on the rise since the  
8 turn of the century. It's a little difficult to  
9 know exactly how many cases there were way back  
10 when, but at least probably since 1910 or 1920 when  
11 this was begun to be looked at, it's certainly been  
12 rising since then.

13          Q.    How does it rank on the list of cancer  
14 caused deaths of men and women today in America?

15          A.    Well, it's the number one cancer causing  
16 death in both men and in women. Just in the last  
17 couple of years the number of lung cancer deaths in  
18 women have surpassed those due to breast cancer.

19          Q.    Doctor Hilgenberg, do you have an opinion  
20 with a reasonable degree of medical certainty as to  
21 whether or not Mr. Kotler's smoking from 1942 until,  
22 say, 1966, was a substantial factor contributing to  
23 his lung cancer?

24          A.    Yes, I do.

1 Q. What's your opinion?

2 A. My opinion is that it was a substantial  
3 factor in the development of his lung cancer.

4 Q. What's the basis of that opinion?

5 A. Well, it's based on the intensity and the  
6 duration of his exposure to cigarette smoke, in  
7 looking at the medical literature, the incidence of  
8 lung cancer and deaths from it increases as a person  
9 smokes more and smokes longer. And if you take the  
10 interval that we discussed, that's a period of 24  
11 years, and if you say that he smoked approximately  
12 one and a half packs of cigarettes per day during  
13 that period of time, that translates into about 36  
14 pack years, in other words one pack per day for a  
15 year, of exposure to cigarettes. That is a very  
16 substantial exposure history.

17 Q. Doctor Hilgenberg, there was some mention  
18 in the opening by defense counsel that if he had  
19 stopped in 1966 he probably wouldn't have gotten  
20 lung cancer. And, in fact, did you make a statement  
21 similar to that in your deposition?

22 A. Yes, I did.

23 Q. I want to ask you a moment about your  
24 deposition.

1                   That was in this particular case?

2           A.     Yes.

3           Q.     And how long were you deposed in this case?

4           A.     For two days.

5           Q.     And how many lawyers were present for these  
6 depositions?

7                   MR. SHEFFLER:  Objection, your Honor.

8                   THE COURT:  Sustained.

9   BY MS. LUMSDEN:

10          Q.     Where did these depositions take place?

11          A.     At the Mass General Hospital.

12          Q.     And where within the hospital?

13          A.     In a conference room.

14          Q.     Today, Doctor Hilgenberg, is it that black  
15 and white to you about whether or not he would have  
16 gotten cancer if he'd stopped smoking?

17                   MR. SHEFFLER:  Objection, your  
18 Honor.

19                   Form.

20                   THE COURT:  The objection as to the  
21 form of the question is sustained.

22   BY MS. LUMSDEN:

23          Q.     Could you explain today, Doctor  
24 Hilgenberg --

1 THE COURT: Well, do you have an  
2 opinion on the subject today as to whether if he had  
3 stopped smoking in 1966 it would have prevented him  
4 from having the cancer which you say killed him? Do  
5 you have an opinion on that now?

6 THE WITNESS: Well, I've already  
7 stated an opinion, so I believe the answer to that  
8 is yes.

9 THE COURT: Is your opinion the same  
10 as what you stated in your opinion?

11 THE WITNESS: Yes. It's a  
12 theoretical issue, and it's somewhat difficult to be  
13 absolutely black and white about it.

14 THE COURT: Well, your opinion, I  
15 take it, none of these opinions are to an absolute  
16 certainty, is that right?

17 THE WITNESS: Yes.

18 THE COURT: And to a reasonable  
19 degree of medical probability, is it now your  
20 opinion that if he had stopped smoking in 1966 he  
21 would not have suffered from the cancer that you say  
22 was responsible for his death?

23 THE WITNESS: I think it's likely  
24 that he would not have had, based on the statistics



1 that the longer a person has -- the longer a person  
2 has stopped smoking that the risk of developing and  
3 dying of a lung cancer becomes less, but it never  
4 reaches that of a non-smoker.

5 BY MS. LUMSDEN:

6 Q. And, in fact, Doctor Hilgenberg, how many  
7 times was his risk increased? Even if you assume  
8 that he stopped smoking, did he still have an  
9 increased risk of getting lung cancer?

10 A. Well, he did.

11 Just to summarize the studies, in a  
12 patient who had been a smoker but had stopped for a  
13 period of about fifteen years, the risk of dying of  
14 the lung cancer even after that period of time is  
15 still two to four times that of a non-smoker. Had  
16 he continued to smoke, the risk of dying of a lung  
17 cancer is probably between ten and twenty times that  
18 of a non-smoker.

19 So the risk diminishes as a person is off  
20 of cigarette smoking for many years, but it never,  
21 ever returns to that level of a person who never had  
22 smoked before.

23 Q. Does part of that opinion rely on the fact  
24 that George Kotler would have been alive in 1984?

1 A. Yes, of course.

2 Q. And can you say whether or not he would  
3 have been alive in 1984?

4 A. There's no way to say that.

5 Q. Doctor Hilgenberg --

6 THE COURT: Hold on. He was alive in  
7 1984.

8 MS. LUMSDEN: But let's say  
9 cancer-free in 1984.

10 THE COURT: Let's have another  
11 question.

12 BY MS. LUMSDEN:

13 Q. Doctor Hilgenberg, there are smokers who do  
14 not get lung cancer, is that right?

15 A. Yes. That's correct.

16 Q. And George Kotler was not in that category?

17 A. George Kotler had lung cancer.

18 Q. Now, in your opinion, did his smoking from  
19 1942 to 1966 continue as a substantial factor in Mr.  
20 Kotler's risk of lung cancer from '66 on.

21 MR. SHEFFLER: Objection to the form.

22 THE COURT: Overruled.

23 A. Yes. My opinion is that that smoking  
24 history between the 1940s and 1966 was a substantial

1 factor in causing his lung cancer.

2 BY MS. LUMSDEN:

3 Q. Doctor Hilgenberg, are the early years of  
4 smoking of some significance?

5 A. Yes, they are. In fact, there are some  
6 studies to indicate that the earlier a person starts  
7 smoking the greater the risk of developing a lung  
8 cancer. So that people who started in their teens  
9 or in their early twenties are at greater risk than  
10 those who start smoking at a later date, say in  
11 their late twenties or thirties.

12 Q. Have there been any studies that you're  
13 aware of, Doctor Hilgenberg, with respect to smokers  
14 who have smoked for twenty or thirty years and then  
15 stopped for a decade or two who then went on to get  
16 lung cancer?

17 A. Yes. There are any number of patients who  
18 have that problem. As I've indicated before, the  
19 several series that have looked at this find that  
20 the risk in former smokers is still greater than it  
21 is in a non-smoker in the range of two to four times  
22 a greater risk of dying of lung cancer than somebody  
23 who had never smoked, even though they'd stopped  
24 smoking for fifteen or twenty years.

1 Q. Did you tell George Kotler that his lung  
2 cancer in your opinion was related to his cigarette  
3 smoking?

4 A. I'm quite certain that I did.

5 Q. Is it your custom to tell a patient if it's  
6 your opinion it's related to cigarette smoking to  
7 tell them it is?

8 A. Yes.

9 Q. When we're talking about smoking here,  
10 we're talking about cigarette smoking, is that  
11 right, as opposed to cigar or pipe smoking?

12 A. Yes. That's what we're talking about.

13 Q. Why is cigarette smoking the significant  
14 type of smoking?

15 A. It probably has a lot to do with the  
16 inhaling of it. And all of the studies that  
17 evaluate this find that cigarette smoking is the  
18 significant factor. People who smoke pipes and  
19 cigars or use smokeless tobacco appear to be at a  
20 somewhat increased risk of cancer as well, but the  
21 studies that we're talking about here today deal  
22 with cigarette smoking.

23 THE COURT: By smokeless tobacco you  
24 mean chewing and snuff and that sort of thing?

1 THE WITNESS: Yes.

2 BY MS. LUMSDEN:

3 Q. In addition to large cell carcinoma of the  
4 lung, in your opinion, Doctor Hilgenberg, is smoking  
5 a causative factor in squamous cell carcinoma of the  
6 lung?

7 A. Yes. Smoking is a factor in the  
8 development -- is a cause of squamous cell carcinoma  
9 of the lung.

10 Q. And adenocarcinoma of the lung?

11 A. Yes.

12 Q. Does it matter to that opinion whether it's  
13 poorly differentiated or moderately differentiated  
14 or well differentiated of any of those?

15 A. No.

16 Q. And are any of the major types of lung  
17 cancer, namely small cell, large cell,  
18 adenocarcinoma and squamous cell carcinoma, are any  
19 of those more frequently associated with smoking  
20 than the others?

21 A. Well, the studies from the mid to late  
22 seventies and on into the eighties implicate  
23 cigarette smoking as the cause of all of these cell  
24 types of lung cancer.

1 Q. During the time that you cared for George  
2 Kotler, did he have any disease process that was not  
3 related to his cigarette smoking?

4 A. Not during the time that I cared for him,  
5 no.

6 Q. When is the last time that you saw George  
7 Kotler?

8 A. It was a few days before he died. It was  
9 the 2nd or 3rd of January of 1985. I'm sorry, 1986.

10 Q. Was he in the hospital at that time?

11 A. Yes. He was in the hospital at the end of  
12 December of '85, and for the first couple of days of  
13 January of '86. And then he was discharged from the  
14 hospital and went home with his family.

15 Q. Why did you discharge him?

16 A. He was clearly terminal at that point, he  
17 was dying, he had only a few more days to live, and  
18 he and his family wanted to be together at home.

19 Q. Did you talk to his wife about that?

20 A. Yes.

21 Q. When did you find out that George Kotler  
22 had died?

23 A. His wife called and let me know that two or  
24 three days after he died at home.

1 Q. Do you have an opinion, Doctor Hilgenberg,  
2 with a reasonable degree of medical certainty as to  
3 the cause of death of George Kotler?

4 A. Yes.

5 Q. What's your opinion?

6 A. My opinion is that he died of lung cancer.

7 Q. And was there a death certificate written  
8 for George Kotler?

9 A. Yes, there was.

10 Q. Who was that written by?

11 A. It was written by the medical examiner in  
12 Cambridge.

13 Q. Did you see that document?

14 A. I have seen a copy of it, yes.

15 Q. And what was the listed cause of death?

16 A. Cancer of the lung.

17 MS. LUMSDEN: I have no further  
18 questions.

19 CROSS EXAMINATION

20 BY MR. SHEFFLER:

21 Q. Good morning, Doctor.

22 A. Good morning.

23 Q. In your response a moment ago to some  
24 questions by Ms. Lumsden you were talking about the

1 risk of an ex-smoker after he quit smoking.

2 Do you recall that?

3 A. Yes.

4 Q. And we had an occasion to talk about that  
5 before as was brought out on your testimony, isn't  
6 that true?

7 A. Yes.

8 Q. Now, Doctor, I was not totally clear with  
9 your response on the direct testimony. Let me ask  
10 you if you still recall telling me at your  
11 deposition on April 6th of 1989 the following:  
12 "Well, I have stated that after about fifteen years  
13 of non-smoking that a smoker's risk of lung cancer  
14 approaches that of a non-smoker."

15 Do you recall stating that, Doctor?

16 A. Yes. That's what I said.

17 Q. And that's correct, isn't it?

18 A. That's correct.

19 Q. "Somewhat more than fifteen years would  
20 have elapsed between 1966 and 1984, so I think it is  
21 more probable than not that he," meaning Mr. Kotler,  
22 "would not have had lung cancer had he stopped  
23 smoking in 1966."

24 Is that correct?



1           A.     That's what I said. And that's my opinion.

2           Q.     That's your opinion. Okay.

3                     Now, Doctor, you saw Mr. Kotler for the  
4 first time in September of 1984?

5           A.     Yes.

6           Q.     And then you saw him at your Mount Auburn  
7 Hospital subsequent to that, is that true, at your  
8 office there?

9           A.     Well, the first time I saw him was at my  
10 office at Mount Auburn in Cambridge, and all of the  
11 subsequent care and office visits were given at Mass  
12 General.

13          Q.     Okay. You have an office at both  
14 hospitals, Doctor?

15          A.     Yes.

16          Q.     Do you have your records with you today?

17          A.     No.

18          Q.     Doctor, am I correct that when you saw Mr.  
19 Kotler at your office on September 28th, Mrs. Kotler  
20 was with him?

21          A.     Yes.

22          Q.     And at that time they brought some x-rays  
23 for you to review?

24          A.     Yes.

1 Q. Do you recall whether there was more than  
2 one May, 1984 x-ray that you reviewed?

3 A. I don't recall specifically. The usual  
4 chest x-ray is composed of two x-rays, a front and a  
5 side view, and chances are that there were two films  
6 from May of 1984, but I do not recall specifically.

7 Q. Let me show you your office record, if I  
8 could, that has been marked previously as  
9 Defendant's Exhibit 14.

10 Now, Doctor, do you have an office note in  
11 there of the September 28th visit (handing)?

12 A. Yes.

13 Q. If you would, Doctor, just take a glance at  
14 that, I think towards the bottom, does it discuss  
15 the x-rays that Mr. Kotler brought with him?

16 A. Yes.

17 Q. And does that refresh your recollection as  
18 to how many films from 1984 you reviewed?

19 A. No.

20 Q. Well, there's a sentence down there that  
21 says, Doctor, "he had a normal chest x-ray in 1976,  
22 '77, and he had a film in 1984."

23 Does that indicate there was one film that  
24 he brought with him, Doctor?

1           A.    It's possible.  Again I don't recall  
2 whether there was one or two.

3           Q.    You don't recall seeing a lateral chest  
4 x-ray in 1984?

5           A.    I don't recall that, no.

6           Q.    Did you look at any films or do you recall  
7 seeing any films before 1984 of Mr. Kotler's chest?

8           A.    Well, my comment here is that he had normal  
9 chest x-rays in '76 and '77.  I doubt that I would  
10 have said that had I not either had a report or the  
11 actual films there.

12          Q.    Do you recall whether you saw the films or  
13 a report?

14          A.    My recollection is that I saw the films.

15          Q.    Have you reviewed any other films since  
16 September of '84 that dealt with the period before  
17 May of 1984?

18          A.    No.

19          Q.    Doctor, on the front sheet of the  
20 Defendants' Exhibit 14 it lists certain office  
21 visits and hospitalizations of Mr. Kotler.

22          A.    Yes.

23          Q.    The first office visit of 9-28 was at Mount  
24 Auburn, is that correct?

1 A. Yes.

2 Q. And he was admitted to Mass General in  
3 October?

4 A. Yes.

5 Q. And he was admitted in Mass General in  
6 December, is that right?

7 A. Yes.

8 Q. Now, the March 12th, 1984 office visit, was  
9 that at Mass General, do you recall?

10 A. Yes. It was at Mass General.

11 Q. The August 6th, '85 was the Mass General?

12 A. Yes.

13 Q. And then Mr. Kotler was admitted in  
14 November to the hospital?

15 A. Yes.

16 Q. Discharged November 10th.

17 You had an office visit with him on  
18 November 26th at Mass General, Doctor?

19 A. Yes.

20 Q. And then the final hospitalization was in  
21 December of '85?

22 A. Yes.

23 Q. Now, Doctor, does that list cover all of  
24 the office visits that you had with Mr. Kotler, to

1 your recollection?

2 A. Yes, it does.

3 Q. Returning to the first office visit of  
4 9-28, did you take a medical history of Mr. Kotler  
5 at this time?

6 A. Yes.

7 Q. And did you ask him about his prior medical  
8 problems?

9 A. Yes.

10 Q. Do you recall if you asked him about prior  
11 heart problems?

12 A. That's a part of my standard history.

13 Q. And when you give a standard history,  
14 Doctor, would you indicate in the notes of your  
15 report if somebody told you that they did have prior  
16 heart disease or heart problems?

17 A. Yes.

18 Q. Did you note anything in Mr. Kotler's notes  
19 of the visit of September 28th that would indicate  
20 that he had told you about prior heart disease or  
21 heart problems?

22 A. There's nothing listed here.

23 Q. Now, you talked about an occasion during  
24 the course of Mr. Kotler's cancer where he

1 developed, I think you called it atrial  
2 fibrillation?

3 A. Yes.

4 Q. That's a disease of the heart, am I  
5 correct?

6 A. Sure. It's a rythm problem of the heart.

7 Q. Did there come a time when a cardiologist  
8 reviewed Mr. Kotler for that problem?

9 A. My recollection is that a cardiologist did  
10 review the problem. The cardiologist's name is  
11 Charles Bouchet.

12 Q. Let me just get the record here, Doctor.

13 This is from the Massachusetts General  
14 Hospital records marked as Plaintiff Exhibit 1, it's  
15 a note from the cardiology department dated November  
16 6th, 1985.

17 Doctor, have you seen this note before  
18 (handing)?

19 A. Yes.

20 Q. Does the first sentence refer to Mr. Kotler  
21 when it says "asked to see this fifty-one year old  
22 post office worker with lung cancer"? Is that  
23 referring to Mr. Kotler?

24 A. Well, it was written by the cardiologist,

1 and it's on a page that has George Kotler's name on  
2 it, and I am certain that it refers to him, yes.

3 Q. "He has no previous history of heart  
4 disease, but on admission was found to be in rapid  
5 AF."

6 Now, "AF" is atrial fibrillation?

7 A. Yes. It's an abbreviation for that.

8 Q. Thank you, Doctor.

9 Now, was Mrs. Kotler present when you told  
10 Mr. Kotler to stop smoking cigarettes?

11 A. Yes.

12 Q. Do you recall when Mr. Kotler was admitted  
13 to the hospital at Mass General on December 11th, do  
14 you recall that time period?

15 A. Yes.

16 Q. And that was where you were going to  
17 perform the bronchoscopy to determine whether his  
18 cancer would be operated on, is that right?

19 A. That's correct.

20 Q. And when you performed the bronchoscopy,  
21 you testified that you did not see any cancer in the  
22 bronchus that you could see with the scope, is that  
23 right?

24 A. Yes. That's correct.

1 Q. So I believe you said that the corina, in  
2 your report, Doctor, was clear.

3 What is the corina?

4 A. Oh, the corina is the place where the  
5 windpipe divides into the two bronchi, the one that  
6 goes to each lung. It's that little crotch right  
7 in-between the two bronchial tubes. That's the  
8 corina, C-o-r-i-n-a.

9 Q. And then did you insert the tube beyond the  
10 corina?

11 A. Yes.

12 Q. There's a phrase in your bronchoscopy  
13 report that states "the remainder of the  
14 endobronchial tree was normal."

15 Is that that tree-like effect that you  
16 were describing for us before with the branching and  
17 the leaves and what have you?

18 A. Yes, exactly. That specifically, of  
19 course, refers to how far out that we can see with  
20 the bronchoscope which means those, the main  
21 bronchial tubes to each lung, plus the lobes on each  
22 side and the very first order of division.

23 So it's, again, a very central look. It  
24 does not look in any way out in the parenchyma or



1 the substance of the lung.

2 Q. You didn't see the cancer in the central  
3 part of the lung, and you concluded it was in the  
4 periphery or the parenchyma?

5 A. Yes.

6 Q. It was at this time, Doctor, that you  
7 concluded that Mr. Kotler was inoperable?

8 A. Yes.

9 Q. Do you recall whether you told Mr. Kotler  
10 and Mrs. Kotler that he was inoperable at this time?

11 A. Oh, I did. I told them that we would not  
12 be able to do surgery and that my recommendation was  
13 to complete the course of radiation treatments.  
14 He'd received about 50 percent of the total dose  
15 that could be safely administered to that area, and  
16 so we went ahead and finished his radiation  
17 treatment, and then that was the extent of the  
18 treatment that he would receive.

19 Q. Now, Doctor, that was about December 13th  
20 that you did the bronchoscopy?

21 A. About.

22 Q. And it would be within a very short period  
23 of time that you reported the results of your  
24 bronchoscopy to Mr. Kotler and Mrs. Kotler?

1           A.     Most likely on the same day.

2           Q.     Mr. Kotler had radiation therapy after the  
3 bronchoscopy procedure was performed?

4           A.     Yes. He had a number of treatments between  
5 the end of October and the beginning of December,  
6 and then he received another series of treatments at  
7 the latter part of December and in January.

8           Q.     In March of 1985, you saw Mr. Kotler again  
9 at your office at Mass General, is that correct?

10          A.     Yes.

11          Q.     Do you recall whether Mrs. Kotler was  
12 present with him at that time?

13          A.     My recollection is that she was not.

14          Q.     Was Mrs. Kotler present with Mr. Kotler on  
15 any visits at the Mass General office, to your  
16 recollection?

17          A.     Well, she was -- okay. She was at the  
18 first one at the Mount Auburn office, and I really  
19 don't recall at the other offices. She certainly  
20 was there when he was hospitalized on all these  
21 various occasions.

22          Q.     Do you have a recollection that Mrs. Kotler  
23 was not present at these office visits at Mass  
24 General Hospital?

1           A.    I seem to recall that he was doing very  
2 well in March of 1985, and that he had come by  
3 himself at that time without her, but I really don't  
4 recall about the other office visits specifically.

5           Q.    Do you recall Mr. Kotler did not drive?

6           A.    I don't know that.

7           Q.    Now, Doctor, in your March 12th, 1985 note  
8 of your office visit, which is in the office records  
9 there before you, you make the statement "he also  
10 remains off of his cigarettes."

11                   Where did you get that information?

12           A.    I asked him.

13           Q.    Do you recall what he said beyond that he  
14 remained off his cigarettes?

15           A.    I don't recall what he said.

16           Q.    Further along, Doctor, in your March 12th  
17 report you state "I think that he has had an  
18 amazingly good result from his radiation therapy.  
19 Obviously no one knows how long this will last, but  
20 I told him to try to be as normal as he can and to  
21 enjoy as much in life as possible at this time."

22                   Do you recall the discussion you had with  
23 Mr. Kotler that is reflected here?

24           A.    I recall that he had received a very nice

1 palliative response to the radiation therapy, he was  
2 feeling well, he was able to work at that time, and  
3 I do recall having that discussion with him.

4 Q. Doctor, do you recall the Massachusetts  
5 General admission on November 3rd, 1985?

6 A. Yes.

7 Q. Was that to the emergency ward first?

8 A. Yes.

9 Q. Do you recall how Mr. Kotler got to the  
10 emergency ward?

11 A. No, I don't.

12 Q. I think maybe the record here might  
13 indicate it for us.

14 Showing you from Plaintiff's Exhibit 1 the  
15 emergency ward admission report of Massachusetts  
16 General Hospital, does it indicate, Doctor, how Mr.  
17 Kotler arrived on that day?

18 A. It says "arrived via car/wife."

19 Q. And, Doctor, in the admission reports of  
20 that visit it has an indication P/S. What does that  
21 mean? Would that be personal and social history?

22 A. I suppose, yes. That's an abbreviation  
23 that's maybe a little less commonly used. I suppose  
24 that's what it is. It mentions some personal habits

1 here.

2 Q. Does it mention, Doctor, "tobacco, 40 packs  
3 per day year, quite one year ago"?

4 A. Yes. The way I would interpret these  
5 abbreviations here is tobacco, 40 pack year history,  
6 quit one year ago.

7 Q. Thank you, doctor.

8 MR. SHEFFLER: No further questions,  
9 your Honor.

10 REDIRECT EXAMINATION

11 BY MS. LUMSDEN:

12 Q. Doctor Hilgenberg, if you assume that  
13 George Kotler continued to smoke after 1966, which  
14 is, in fact, the case, in your opinion did his  
15 smoking from those years of '42 until '66 continue  
16 as a substantial factor causing his lung cancer?

17 MR. SHEFFLER: Objection, your  
18 Honor.

19 This is the same ground that was covered  
20 on direct.

21 THE COURT: It sounds like the same  
22 question.

23 MS. LUMSDEN: They brought up this  
24 whole part on cross, your Honor.

1 THE COURT: I know, but you're asking  
2 the same question, you're going to get the same  
3 answer. The objection is sustained. At least I  
4 assume you'll get the same answer.

5 MS. LUMSDEN: Thank you.

6 I have no other questions.

7 THE WITNESS: Thank you.

8 THE COURT: I take it you have no  
9 recross on the basis of that?

10 MR. SHEFFLER: No.

11 THE COURT: Thank you.

12 Do you want to take the morning recess  
13 before we take up the next matter? You're going to  
14 go ahead with the deposition, are you, or somebody's  
15 deposition?

16 MR. INGE: That's still being  
17 negotiated, your Honor.

18 THE COURT: What do you expect to do  
19 with the rest of the morning?

20 MR. INGE: Your Honor, we'd like to  
21 discuss that.

22 THE COURT: You better have something  
23 to do. A lot of people have come along way to hear  
24 you.

1                   We'll take the morning recess. I'll see  
2 counsel.

3                   THE CLERK: All rise. Court is now  
4 in recess.

5                   (The jury left the courtroom at 10:45  
6 o'clock a.m.)

7                   THE COURT: Counsel, what are you  
8 going to do? Do you have a lay witness or anybody  
9 to fill?

10                  MR. INGE: We have no live witnesses,  
11 your Honor.

12                  THE COURT: You act as if this was  
13 the first case that was ever tried. Nobody ever  
14 knew anything about backing up witnesses?

15                  MR. NISSEN: We do have the  
16 deposition of George's sister who passed away which  
17 we've agreed to, and that would take about 45  
18 minutes or an hour.

19                  MR. BEZANSON: Almost agreed to.

20                  MR. INGE: It's not completely agreed  
21 to.

22                  MR. NISSEN: Then we'd like to read  
23 some portions of the Surgeon General's report which  
24 we think will take us through very close to the 1:00

1 o'clock time.

2 THE COURT: All right.

3 MR. INGE: Thank you, Judge.

4 THE COURT: If you can't straighten  
5 it out I'll straighten it out on the sister, but  
6 let's move along. We've got people coming down from  
7 Leominster, and we've got to give them something to  
8 make their trip worthwhile.

9 MR. NISSEN: We'll go through very  
10 close to the 1:00 o'clock.

11 THE COURT: Okay. Court is in  
12 recess.

13 (Whereupon, a recess was taken from 10:58  
14 to 11:20 o'clock a.m.)

15 MR. INGE: With the Court's  
16 permission I would now like to read portions of the  
17 deposition of Marie Nagle.

18 And again with the Court's permission I  
19 may say that Marie Nagle was George Kotler's older  
20 sister, and she died approximately a month ago, and  
21 the Rules of Civil Procedure allow us in that  
22 instance to read to you the testimony that was given  
23 at the deposition, and that was on June 5th, 1989.

24 I should also say that her deposition was



1 taken by the Defendants in this case

2 "Q. First of all, what is your full name?

3 "A. Marie Margaret Nagle.

4 "Q. And your address?

5 "A. [DELETED]

6

7 "Q. Do you have any nicknames that you go by?

8 "A. No.

9 "Q. Everybody calls you Marie?

10 "A. Yes.

11 "Q. Where were you born?

12 "A. Born Somerville, Somerville.

13 "Q. And what date, please?

14 "A. January the 8th, 1925.

15 "Q. I have certain dates I'll just check with  
16 you.

17 Your brother was born January 10th, 1930?

18 "A. Yes.

19 "Q. And he died January 11th, 1986?

20 "A. Yes."

21 Page seven, line nine.

22 "Q. All right. Well, let's go back to kind of  
23 the beginning and talk about your early education.

24 Where did you go to school, grammar

1 school?

2 "A. Sacred Heart School.

3 "Q. That's in Cambridge?

4 "A. Yes.

5 "Q. How long did you attend that school, until  
6 what age level?

7 "A. Eight years. I attended it eight years,  
8 until the eighth grade.

9 "Q. And you graduated in the eighth grade?

10 "A. Yes.

11 "Q. And then what school did you attend?

12 "A. Mount Saint Joseph's Academy in Brighton.

13 "Q. In Brighton.

14 Did you graduate from that?

15 "A. No. My mother and father died.

16 "Q. So you had to leave school?

17 "A. Yes.

18 "Q. And what did you do at that point when you  
19 left school?

20 "A. I went to work in a restaurant.

21 "Q. In a restaurant?

22 "A. Yes.

23 "Q. How old were you at that time, Mrs. Nagle?

24 "A. Fifteen.

1 "Q. Fifteen?

2 "A. Fifteen.

3 "Q. Where did you work?

4 "A. Hayes & Bickford's.

5 "Q. In Cambridge?

6 "A. No. Arlington, Arlington Street in Boston.

7 "Q. You met Mr. Nagle in 1946?

8 "A. I guess so, yes. I was twenty-one,  
9 whatever that is.

10 "Q. And you were married a couple of years  
11 later, 1948?

12 "A. Yes.

13 "Q. Where were you married?

14 "A. Cohasset.

15 "Q. In a church ceremony?

16 "A. Yes."

17 Page ten, line twelve.

18 "Q. Did your brother attend the wedding?

19 "A. Yes.

20 "Q. And the date of your marriage was, do you  
21 recall that?

22 "A. July 4th, 1948.

23 "Q. Let's go to the deaths of your mother and  
24 father.

1                   Your father died 1939, is that correct?

2                   "A. I guess so. I don't remember the dates.

3                   "Q. You don't remember the dates.

4                   Do you remember he was about forty-one  
5 when he died?

6                   "A. Yes, I do, yes.

7                   "Q. Do you remember what his occupation was?

8                   "A. Yes. He was a gas fitter. He worked for  
9 the gas company.

10                  "Q. Did he also play the piano?

11                  "A. Yes, he did.

12                  "Q. Did he just play it for entertainment or  
13 professionally?

14                  "A. Professional.

15                  "Q. Where did he do that?

16                  "A. I don't know.

17                  "Q. Do you remember?

18                  "A. No.

19                  "Q. Did you have a piano at home?

20                  "A. Yes.

21                  "Q. And he played it at home?

22                  "A. Yes."

23                               Page eleven, the last line.

24                  "Q. Do you recall what your father died of?

1 "A. No, I don't.

2 "Q. The family didn't tell you?

3 "A. Right.

4 "Q. Do you remember learning anything about  
5 your father's death?

6 "A. I know he was in the hospital for quite a  
7 while.

8 "Q. Do you remember discussing that with your  
9 mother or your sister?

10 "A. No. My mother never discussed it with us.

11 "Q. And your mother died about a year later?

12 "A. Yes."

13 Page thirteen.

14 "Q. But this losing your mother and father at  
15 an early age must have been quite a traumatic thing  
16 for you.

17 "A. Yes, it was.

18 "Q. I'm trying to take you back, I know it's  
19 not a pleasant time.

20 "A. No, it's not.

21 "Q. I'm trying to get some information about  
22 what you three children went through at that time,  
23 you and your brother and your sister Eleanor, and  
24 now you're orphaned in 1940 and George is about ten,

1 and you're about fifteen or sixteen?

2 "A. Sixteen, yes.

3 "Q. And your sister Eleanor was about two years  
4 older than you, is that right?

5 Again would you say yes or no, please?

6 "A. Yes.

7 "Q. Now, the three of you left alone, did you  
8 have some discussions about what was going to happen  
9 next?

10 "A. No. We just took it day by day, did  
11 whatever we could, that's all.

12 "Q. Did you have some discussion about where  
13 you were going to live?

14 "A. No. We just went out and we looked for a  
15 place, looked for an apartment until we found one.

16 "Q. Well, didn't you go live with your Aunt  
17 Agnes?

18 "A. For a while, a very short while. Maybe  
19 four months or something.

20 "Q. Four months?

21 "A. Maybe.

22 "Q. And where was that?

23 "A. That was on Thorndike Street.

24 "Q. One hundred one Thorndike?

1 "A. No. Across the street. I don't know the  
2 number. One hundred one is where I lived.

3 "Q. And you lived with her about four months?

4 "A. I think so. I couldn't --

5 "Q. The three of you, the three children?

6 "A. Three, yes.

7 "Q. And now you say you went to a place on your  
8 own?

9 "A. Yes. We left there.

10 "Q. Who found that place?

11 "A. I probably did.

12 "Q. How about Eleanor, did she help?

13 "A. Not really, no.

14 "Q. So you were about sixteen and you went out  
15 and found an apartment to live in?

16 "A. Yes.

17 "Q. And where was that, do you recall?

18 "A. Over at the Back Bay, Burbank Street, I  
19 think.

20 "Q. Do you remember the number?

21 "A. No.

22 "Q. And that was sometime in 1940?

23 "A. I guess, yes.

24 "Q. And you lived there alone with Eleanor and

1 George?

2 "A. No. With George. Eleanor didn't live with  
3 us.

4 "Q. Eleanor did not live with you.

5 Where did she live?

6 "A. I don't know. But we broke up and then I  
7 was with my brother.

8 "Q. So you're sixteen and your brother is ten?

9 "A. Yes.

10 "Q. And the two of you were living alone in an  
11 apartment in the Back Bay on Burbank Street?

12 "A. Right.

13 "Q. And did you support your brother?

14 "A. Yes.

15 "Q. Was there any money in the family that was  
16 left, any insurance or anything?

17 "A. Whatever they left the relatives took.

18 "Q. You had nothing?

19 "A. No.

20 "Q. And did you continue to work at Hayes  
21 Bickford?

22 "A. Yes.

23 "Q. And that was in Boston, Hayes Bickford?

24 "A. That was South Station, I think, that I



1 first started.

2 "Q. And where did George go to school?

3 "A. Sacred Heart.

4 "Q. Had he been in the Sacred Heart before your  
5 parents died?

6 "A. Yes.

7 "Q. He continued to go there?

8 "A. (Nodding in the affirmative.)

9 "Q. Did he graduate from Sacred Heart?

10 "A. No.

11 "Q. He didn't?

12 "A. I don't think so.

13 "Q. How long did you live on Burbank Street,  
14 you and George?

15 "A. Gee, I couldn't tell you. I don't know.

16 "Q. Well, how long did you work at Hayes  
17 Bickford?

18 "A. Oh, I worked there for quite a few years.

19 "Q. Can you think of a date, 1940 to when?

20 "A. Oh --

21 "Q. If you went to Cohasset in 1946 in the  
22 summer --

23 "A. I must have been there until then.

24 "Q. You worked for Hayes Bickford up until that

1 time?

2 "A. Yes.

3 "Q. And George was still living with you?

4 "A. Well, he lived with my aunt for a while,  
5 too, and I paid his board.

6 "Q. When did he go live with your aunt?

7 "A. I don't know. I can't remember any dates  
8 of anything, but I know he lived there, too. I  
9 don't know.

10 "Q. At some period of time you lived alone at  
11 Burbank Street?

12 "A. No. I lived with a girlfriend.

13 "Q. On Burbank Street?

14 "A. A girlfriend moved in, yes.

15 "Q. So a girlfriend moved in and George went to  
16 live with his aunt?

17 "A. Yes.

18 "Q. That was Agnes Woolf?

19 "A. Yes.

20 "Q. You don't remember how old he was at that  
21 time?

22 "A. He must have been eleven. I don't know. I  
23 really don't know.

24 "Q. He came down to stay that summer with you

1 in Cohasset part-time, did he?

2 "A. Yes, he did.

3 "Q. Did he work down there?

4 "A. No. He lived with a policeman and his  
5 wife. We both lived with them down in Cohasset.

6 "Q. But he just had a summer off, he didn't go  
7 to work?

8 "A. Yes. That's right."

9 Page 24, line two.

10 "Q. When your mother died, where was she?

11 "A. When my mother died where was she?

12 "Q. Yes.

13 Was she in the hospital or home?

14 "A. No. She was home.

15 "Q. And had she been sick for a while?

16 "A. Not that I know of, no. I didn't know she  
17 was sick. She seemed to be all right.

18 "Q. Do you recall the doctor coming or any  
19 nurses coming?

20 "A. No, no, no. She just died in her sleep.

21 "Q. How about your father?

22 "A. My father was in the hospital in Belmont."

23 Page 25.

24 "Q. You don't recall any discussions with any

1 doctors or medical people about your father's death?

2 "A. No, I never discussed it, just my mother.

3 "Q. Do you recall discussions about your  
4 mother's death?

5 "A. No. The relatives took care of everything.

6 "Q. By 'the relatives,' you mean who?

7 "A. Well, sisters, brothers, aunts, uncles,  
8 whatever.

9 "Q. Could you be more specific?

10 There was Agnes Woolf?

11 "A. Well, my mother's sisters.

12 "Q. Their names?

13 "A. Helen Sullivan, Ann Griffin.

14 "Q. And they took care of your mother's  
15 situation?

16 "A. Well, I don't know who took care of what,  
17 but they all took everything and took care of  
18 everything, and that's all I know.

19 "Q. Did any of them other than Agnes suggest  
20 you come and live with them, you and George at  
21 least?

22 "A. Yes. My grandmother.

23 "Q. But you didn't go?

24 "A. Yes, we went for a couple of days, and then

1 she was going to put us in a home, we left.

2 "Q. And then you went to Agnes?

3 "A. Yes. And she was going to put us in a  
4 home, we left. Nobody bothered to look for us, so  
5 that was good.

6 "Q. You certainly didn't want to go to a home,  
7 I gather?

8 "A. No.

9 "Q. And you wanted to stay with your brother?

10 "A. Uh-huh.

11 "Q. Was it important to you that you and George  
12 stay together?

13 "A. Yes, it was.

14 "Q. You were close to George?

15 "A. Uh-huh.

16 "Q. As George grew up, did you feel that you  
17 were really his parent or a parent?

18 "A. Well, in a way, I guess, yes.

19 "Q. You were the only one he could go to for  
20 advice and ask questions about life or anything in  
21 particular, isn't that so?

22 "A. Yes.

23 "Q. Let me, if I may, go through, after you and  
24 Richard Nagle were married in 1948, where did you

1 first live together as husband and wife?

2 "A. Cohasset.

3 "Q. And where did George live?

4 "A. I guess he always stayed with that  
5 policeman and his wife when we first moved there  
6 that we lived with."

7 Now we go to page 28, line nineteen.

8 MR. BEZANSON: Twenty-eight?

9 MR. INGE: Page 28.

10 "Q. Well, was it 1949 that you moved to 101  
11 Thorndike Street?

12 "A. No. It was a little later than that.

13 "Q. Do you want to take a break?

14 "A. I'm all right.

15 My son was born there in '49, but I don't  
16 know what year we moved there.

17 "Q. You were there, by 1949 you were at 101  
18 Thorndike Street, is that correct?

19 "A. Yes.

20 "Q. And was George living with you?

21 "A. Yes, he was.

22 "Q. And what was George doing?

23 "A. He worked different jobs. He never worked  
24 anything real steady, not that I know of anyway. I

1 can't remember.

2 "Q. All right. And how long did George live  
3 with you?

4 "A. Three, four years, I guess.

5 "Q. Let's see, in 1949 he was nineteen?

6 "A. I guess so, yes.

7 "Q. Do you remember talking with him about any  
8 of his jobs?

9 "A. Oh, yes. I suppose I did, but I wouldn't  
10 remember them now.

11 "Q. Did George pay you rent?

12 "A. When he worked he did, yes.

13 "Q. And was that fairly regularly even though  
14 he changed jobs?

15 "A. Well, pretty good, yes. He was pretty  
16 good.

17 "Q. What did George do in his spare time during  
18 the period he was living with you that you recall?

19 "A. I don't know. Bowl. I don't know what he  
20 did really.

21 "Q. Did you discuss things that he did with  
22 him?

23 "A. Yes, we did, but that was a long time ago.  
24 I don't remember.

1 "Q. Well, let me see if I can --

2 "A. There's nothing I can remember about that.  
3 It's just a blank.

4 "Q. Well, up until George was, say, eighteen,  
5 you were at least a guiding parent, wouldn't you  
6 say?

7 "A. Yes, in a way.

8 "Q. And maybe later on when he needed advice  
9 he'd talk to you about various things?

10 "A. No. Later on he didn't, no.

11 "Q. When he was nineteen and twenty,  
12 twenty-one?

13 "A. No.

14 "Q. He didn't?

15 "A. No. I had my own family starting then, and  
16 things were different."

17 Page 32.

18 "Q. Did George do much besides bowling in  
19 sports? What other sports was he interested in?

20 "A. I don't know. I really don't know. Like I  
21 said, I had my own family, I worked, Georgie took  
22 off and did what he wanted to do. He was old  
23 enough, he was certainly entitled.

24 "Q. Well, did he play baseball when he was in



1 school?

2 "A. Yes. He did play baseball, yes.

3 "Q. How about other sports; football?

4 "A. No, I don't think so.

5 "Q. Hockey, street hockey?

6 "A. Maybe street hockey. I don't know.

7 I know he liked baseball. That's all I  
8 know."

9 Page 33.

10 "Q. Did he bowl with any particular group of  
11 friends?

12 "A. I really don't know.

13 "Q. When did George no longer live with you,  
14 Mrs. Nagle?

15 "A. Oh, let's see, do you remember?"

16 I will say her husband was present at the  
17 deposition and that question was directed to him?

18 "A. Oh, let's see, do you remember? It was  
19 after Ricky was born.

20 About 1955, I guess.

21 "Q. Fifty-five?

22 "A. Uh-huh.

23 "Q. Did you have a television when George was  
24 living with you?

1 "A. Yes.

2 "Q. Did George like to watch television?

3 "A. Yes.

4 "Q. Any particular things that he watched?

5 "A. I don't know.

6 "Q. Did he watch sports?

7 "A. I really don't know.

8 "Q. Do you remember him being particularly  
9 interested in the Red Sox?

10 "A. He liked baseball, that's all I know.

11 "Q. Baseball?

12 "A. He did like baseball."

13 Page 36, line seven.

14 "Q. At some time did George rent a room on Otis  
15 Street in Cambridge?

16 "A. Yes, he did.

17 "Q. Was that the first time he moved out?

18 "A. Yes.

19 "Q. Wasn't that in 1961, about then?

20 "A. I guess so.

21 "Q. Do you recall whether you had a family  
22 doctor when you were young?

23 "A. No, we didn't have one when we were young.

24 "Q. Do you recall getting shots?

1 "A. Yes, the school used to give them to us.

2 "Q. At the school.

3 And that was Sacred Heart?

4 "A. Uh-huh.

5 "Q. But you don't recall the name of any  
6 particular doctor that the family went to?

7 "A. No.

8 "Q. Or the doctor that treated your father or  
9 your mother?

10 "A. No.

11 "Q. Did you talk to any of your aunts or  
12 anybody in the family when you went off to live with  
13 George about bringing up the boy?

14 "A. No. Nobody was interested.

15 "Q. Nobody was interested?

16 "A. No.

17 "Q. Where did you get any knowledge about  
18 bringing up a younger brother?

19 "A. I didn't have any knowledge. I just took  
20 him with me.

21 "Q. Did you read anything?

22 "A. No.

23 "Q. Did you talk to any social workers?

24 "A. No.

1 "Q. Did you talk to people at work?

2 "A. I probably did. I don't remember.

3 "Q. Did George cause you any particular  
4 problems when you were living alone?

5 "A. No, he didn't.

6 "Q. He didn't?

7 "A. Not that I can remember.

8 "Q. What were his interests at that time?

9 "A. Didn't you just ask me that?

10 Q. I'm going back now to when you were living  
11 alone. I apologize, I'm jumping around a little  
12 bit.

13 "A. The same as I told you before; bowling,  
14 school, baseball.

15 "Q. When he was eleven, twelve, thirteen, did  
16 he have interests other than bowling and baseball?

17 "A. School.

18 "Q. And school?

19 "A. School took up most of his time, I guess.

20 "Q. And did he read?

21 "A. Well, his homework.

22 "Q. Other than that?

23 "A. No, not too much.

24 "Q. Magazines or newspaper?

1 "A. Oh, yes, I guess he read magazines. I  
2 think so. But I don't remember what they were."

3 Page 39, line twenty.

4 "Q. Let's go back to when you and George were  
5 living together on Burbank Street, and you said you  
6 were working two jobs.

7 "A. Uh-huh.

8 "Q. And George was pretty much on his own?

9 "A. Not working two jobs. I was working  
10 overtime on the job I was in.

11 "Q. But long hours?

12 "A. Yes.

13 "Q. And George was pretty much on his own?

14 "A. Yes.

15 "Q. Did that concern you?

16 "A. No, because I just told him if he got in  
17 any trouble, I don't know what would happen to us,  
18 he just had to do what he was told, that's all. He  
19 was a pretty good kid.

20 "Q. Was he able to take care of himself?

21 "A. No. I took care of his clothes and stuff.

22 "Q. When you weren't there?

23 "A. Yes. He used to come over to the  
24 restaurant to eat where I was.

1 "Q. He did?

2 "A. Yes.

3 "Q. Did he take himself back and forth to  
4 school?

5 "A. No. I used to send him to school.

6 "Q. He went to Sacred Heart?

7 "A. Yes.

8 "Q. And did he take the subway?

9 "A. Yes. Subway, I guess.

10 "Q. Talk a pause for a moment."

11 And there was a pause.

12 "Q. Well anyway, he got himself back and forth  
13 on the subway?

14 "A. Yes.

15 "Q. And he got himself down to where you worked  
16 for a meal?

17 "A. Uh-huh.

18 "Q. And then he got himself home?

19 "A. Yes.

20 "Q. And he was in the apartment on his own a  
21 good deal of the time?

22 "A. A lot of the time, yes.

23 "Q. But you weren't concerned about that  
24 because George could take care of himself, is that

1 fair to say?

2 "A. Yes, I guess."

3 Page 43, line 22.

4 "Q. Do you remember when George went into the  
5 Navy, when he enlisted?

6 "A. Vaguely, yes. I don't know how old he was  
7 or anything.

8 "Q. Do you know whether he drank before he went  
9 in the Navy?"

10 Mrs. Nagle turning to her husband, "do you  
11 know?" Mr. Nagle responded, "you answer." The  
12 answer was "I don't know."

13 Page 45, line fourteen.

14 "Q. When George was in the Navy, did he visit  
15 you on liberty or leave?

16 "A. Yes. When he was on leave he used to come  
17 home. He used to stay with me.

18 "Q. And he stayed with you?

19 "A. Yes.

20 "Q. Do you know where George was living in  
21 1953?

22 "A. Gee, no, I don't. I don't know whether he  
23 was with me or he wasn't. I don't know the years."

24 Page 49, line eleven.

1 "Q. Well, I meant to ask you; do you recall the  
2 name of the police officer and his wife that George  
3 lived with in Cohasset?

4 "A. Yes, Frank Milleach (ph).

5 "Q. Do you think you can spell that with Mr.  
6 Nagle's help? Could you pronounce it again?

7 "A. Milleach.

8 He's blind now, and he's really all fouled  
9 up.

10 "Q. Do you see them from time to time?

11 "A. No. I saw them at a time about -- what was  
12 the Cohasset time we went to?

13 "Retirement chief's time, yes, I saw him there.  
14 They were a friend of the chief."

15 Let's go down to line fifteen.

16 "Q. And the name of your roommate, the woman  
17 that lived with you when you lived in Back Bay?

18 "A. Norma Kelley.

19 "Q. Is she still around?

20 "A. No. She's long gone. I don't know. She  
21 got married and moved away years ago."

22 Page 51.

23 "Q. How did it happen that George stayed with  
24 Milleach?



1 "A. Because I stayed there, I boarded, I rented  
2 two rooms there.

3 "Q. So the two of you stayed there?

4 "A. Yes.

5 "Q. How did that come about?

6 "A. Well, I went to work down there at  
7 Kimball's, and I had to get a room, so I got a room  
8 there and I got him a room there.

9 "Q. Was it just a listed room, you didn't know  
10 them before you moved in?

11 "A. No, I didn't, but somebody recommended  
12 them.

13 "Q. Do you remember who that was?

14 "A. Gee, no, I don't."

15 Page 55, line 21.

16 "Q. How is your health generally today, Mrs.  
17 Nagle?

18 "A. Bad. I'm on a dialysis machine. I have  
19 Waggoner's disease.

20 "Q. What?

21 "A. Waggoner's disease. I had half my lung  
22 out."

23 Your Honor, if I may, there is a contested  
24 portion which I'd just as soon now skip over and

1 perhaps I'll have the opportunity to come back to it  
2 at another point.

3 THE COURT: All right.

4 MR. INGE: Page 71, the bottom, line  
5 24 on page 71.

6 "Q. Did you have any discussions about drug use  
7 among the younger generation coming along?

8 "A. No."

9 If I may say, referring to conversations  
10 between George Kotler and his sister.

11 "Q. You both had young children. You didn't  
12 have any discussions about those problems?

13 "A. No.

14 "Q. Raising children in today's world?

15 "A. Children were young then, and they didn't  
16 take drugs or anything, why would I discuss it?"

17 Line seventeen, 72.

18 "Q. Okay. Did George have any views about  
19 whether too many people were getting off that were  
20 arrested by the police?

21 "A. I don't know.

22 "Q. You never discussed that with him?

23 "A. I don't think so. Not that I remember.

24 "Q. Did you discuss alcohol in reference to

1 bringing up children?

2 "A. No.

3 "Q. How did George feel towards his kids?

4 You say you discussed kids?

5 "A. Oh, he was crazy about his kids. He used  
6 to watch the games and everything with the kids, I  
7 know that.

8 "Q. What games?

9 "A. Games on TV, baseball games.

10 "Q. What else did he do with the kids that you  
11 discussed?

12 "A. I don't know. You'd have to ask his wife  
13 that. I didn't see him. I keep telling you I  
14 didn't see him that much. We didn't discuss all  
15 this business, we didn't discuss all of his  
16 business."

17 Page 74, line thirteen.

18 "Q. Let's go back to the time that George moved  
19 out after you and Mr. Nagle were married.

20 I think you said he was about nineteen and  
21 he got his own apartment?

22 "A. He got his own apartment?

23 "Q. He got a room somewhere.

24 "A. Yes. But I don't know if he was nineteen.

1 Maybe he was.

2 "Q. How old was he?

3 "A. I don't know. I think my Ricky was born  
4 then, and I don't know.

5 How old would George be when Ricky was  
6 born?" Speaking to her husband.

7 "A. About twenty-two.

8 "Q. So he lived with you until he was about  
9 twenty-two?

10 "A. Yes.

11 "Q. And how did it come about that he moved  
12 out?

13 "A. Well, I only had a small apartment, and I  
14 had another baby, and I had his brother," meaning  
15 Mr. Nagle's, "and so they both had to move out. I  
16 only had three rooms, and an attic room.

17 "Q. Did you ask him to leave?" Meaning  
18 George.

19 "A. Yes.

20 "Q. And what did he say?

21 "A. He said yes.

22 "Q. Did you and he talk about where he was  
23 going to live?

24 "A. No. He came back and told me where he was

1 going to live.

2 "Q. He found a place?

3 "A. Yes, a rooming house.

4 "Q. Did you have any discussions about the type  
5 of place he might find that he could afford?

6 "A. No, no. That was up to him. He was a  
7 grown man then. We didn't discuss those things."

8 Line fifteen.

9 "Q. When George went into the Navy, did you  
10 have any discussions about that?

11 "A. No.

12 "Q. Did he tell you why he was going in?

13 "A. No, I don't remember. I don't know whether  
14 he was called in or he joined. I don't remember.

15 "Q. When George got engaged to Joanne, do you  
16 recall that point in time?

17 "A. Yes.

18 "Q. And had you met Joanne before they were  
19 engaged?

20 "A. Yes. I think once or twice.

21 "Q. How did you react to Joanne?

22 "A. I liked anybody he brought home. Anybody  
23 he liked was fine with me.

24 "Q. Did you tell him that?

1 "A. Yes.

2 "Q. Did he tell you that he was going to marry  
3 Joanne before the engagement?

4 "A. Gee, I don't know.

5 "Q. Did you have some discussions about where  
6 he was going to live?

7 "A. Probably. I think he moved into my flat.  
8 I moved into my Willow Street and he moved into  
9 Thorndike Street where I left.

10 "Q. Other than Joanne, you say you liked  
11 anybody he brought home, did he bring home other  
12 women?

13 "A. Just one years ago.

14 "Q. Who was that?

15 "A. I don't remember her name, but I only met  
16 her once.

17 "Q. Well, do you remember how long George lived  
18 with you after you and Mr. Nagle were married?

19 "A. I don't remember. Until he was about  
20 twenty-one, twenty-two. I'm only six years older  
21 than him, you know. I don't remember. We got  
22 married in '48.

23 "Q. And George was about eighteen at that time?

24 "A. George was -- I was twenty-three, he was

1       seventeen, and he stayed with us until he was about  
2       twenty-two I guess."

3               Page 89, line seventeen.

4               "Q. You've told us that you were at home --  
5       rather your mother was at home when she died?

6               "A. Yes.

7               "Q. And you and George and Eleanor were living  
8       there at the time?

9               "A. Yes.

10              "Q. This may be a tough question, but can you  
11       remember how you found out that your mother had  
12       died?

13              "A. Well, I went to school, my sister found  
14       her, and when I came home, I left school because  
15       I --"

16                       MR. BEZANSON: Excuse me, Mr. Inge.  
17       I think the record reflects that these questions  
18       were being asked by you now.

19                       MR. INGE: That's right, your Honor.

20                       THE COURT: Okay.

21                       MR. INGE:

22              "Q. This may be a tough question, but can you  
23       remember how you found out that your mother had  
24       died?

1 "A. Well, I went to school, my sister found  
2 her, and when I came home, I left school because I  
3 thought there was something wrong, and when I come  
4 home that's when I found out.

5 "Q. How did you find out?

6 "A. My sister told me. She found her.

7 "Q. And was your mother in the home at that  
8 time or had she been removed by the time that you  
9 got home from school?

10 "A. They were just removing her when I went in.

11 "Q. And can you go back in your mind and tell  
12 us if you have an image of George being present at  
13 that time?

14 "A. Oh, I can't. I think somebody took him.

15 "Q. Do you remember how George reacted to that?

16 "A. No, I don't. I think one of the relatives  
17 come and took him. I don't remember.

18 "Q. Do you have an opinion as to whether you  
19 think he understood what had happened?

20 "A. I imagine he did. He was nine years old.

21 "Q. What was the relation like between George  
22 and his mother?

23 "A. Good.

24 "Q. Were you able to say -- are you able to



1 tell us today if George became depressed or anything  
2 as a result of losing his mother?

3 "A. That I don't know. I don't know. Georgie  
4 was very quiet.

5 "Q. Mrs. Nagle, did you notice much change in  
6 George's behavior after he lost his parents?

7 "A. No. Not really, no.

8 "Q. He stayed quiet?

9 "A. Yes. He was always quiet, yes. Very  
10 quiet. He didn't discuss too many things.

11 "Q. At the time you were fifteen?

12 "A. What made you think that you should be the  
13 one to take care of George?

14 "A. Because I always did, I guess. If I had to  
15 pick him up from school or anything like that, I did  
16 it.

17 "Q. You worked as a teenager a lot of overtime?

18 "A. Yes.

19 "Q. I'm getting the impression that as far as  
20 teenage activities are concerned, you didn't have a  
21 whole lot of time for that?

22 "A. No.

23 "Q. You smoked cigarettes?

24 "A. Yes.

1 "Q. Pall Mall?

2 "A. That was a long time ago.

3 Is that really an objection now?

4 At one time I did. I smoked different  
5 ones."

6 Page 94, line 21.

7 "Q. What was it that as a fifteen year old girl  
8 that you knew about this home that people kept  
9 wanting to put you in that made you think it was not  
10 a good place to be?

11 "A. Because it was a threat, 'if you're not  
12 good I'll put you in a home.'

13 "Q. When you got the amount on Burbank Street,  
14 that's an apartment that you yourself found?

15 "A. Uh-huh.

16 "Q. And you yourself paid for it?

17 "A. Yes.

18 "Q. What did you do for furniture?

19 "A. It was furnished.

20 "Q. Who would cook?

21 "A. I would, but I worked in a restaurant.

22 "Q. When George would come down to the  
23 restaurant, you said occasionally he would have a  
24 meal?

1 "A. Uh-huh.

2 "Q. Did someone have to pay for that?

3 "A. Yes. I did.

4 "Q. Who did?

5 "A. I did.

6 "Q. My five minutes are up.

7 "A. Okay. Good. Now we can go?"

8 MR. BEZANSON: Your Honor, may I  
9 approach?

10 (Side bar conference.)

11 MR. BEZANSON: Mr. Inge left out some  
12 materials that I had been given to understand would  
13 be read.

14 THE COURT: So read them in.

15 MR. INGE: Your Honor, before you  
16 give him the absolute green light, I did try to  
17 adhere to the letter to what we agreed on.

18 THE COURT: What do you want to put  
19 in?

20 MR. BEZANSON: He skipped so many  
21 pages that I have to take a moment to review and  
22 see.

23 I'd like to put in page 80, line ten, and  
24 continue.

1 THE COURT: The whole process struck  
2 me -- I don't know what the ultimate relevance is,  
3 but I don't see how this is relevant, what do the  
4 attitudes of Mrs. Whatever her name is have to do  
5 with the case? You got it in and nobody objected.  
6 Now what do you want?

7 MR. INGE: Your Honor, what I'd like  
8 to do is to --

9 THE COURT: Mrs. Nagle.

10 MR. INGE: What I'd like to do is to  
11 work with Mr. Bezanson --

12 THE COURT: Do what you're going to  
13 do right now. If you have an objection --

14 MR. INGE: Can we have the proposed  
15 offerings?

16 We do have other evidence for this  
17 afternoon.

18 THE COURT: There isn't anything this  
19 afternoon.

20 MR. INGE: I'm sorry. In other  
21 words, this Nagle deposition reading isn't the only  
22 thing we have.

23 THE COURT: I understand he's going  
24 to read. I can hardly wait.

1 MR. BEZANSON: I'm trying to find  
2 this. I think just page 80, line ten through  
3 twenty.

4 THE COURT: Any objection?

5 MR. INGE: I'm sorry. From ten  
6 until?

7 MR. BEZANSON: Eighty, ten to twenty,  
8 and I'd like just a moment here. Is that all  
9 right?

10 THE COURT: Do have any objection to  
11 it?

12 MR. INGE: Your Honor, can you read  
13 it? It's from ten to twenty.

14 THE COURT: You've gotten into this,  
15 you've opened up virtually everything about it. I  
16 don't know why, but you've opened up everything  
17 about it.

18 MR. INGE: But this is a  
19 philosophical statement about there comes a time  
20 when people are grown up and they're on their own.

21 THE COURT: I don't know why you got  
22 into all this, but once you're in it you're in it,  
23 and I'll permit it.

24 MR. INGE: So you want to read that?

1 THE COURT: If anybody had  
2 objected --

3 MR. INGE: I have an objection to --

4 THE COURT: Anything else, Mr.  
5 Bezanson?

6 MR. BEZANSON: I'm sorry, sir?

7 THE COURT: Is there anything else  
8 you want to read?

9 MR. BEZANSON: There's one other  
10 section I'm trying to find but I haven't been able  
11 to locate it.

12 THE COURT: She's going to be an  
13 expert now?

14 MR. INGE: She's dead.

15 MR. BEZANSON: Do you want me to read  
16 this page 80, lines ten through twenty?

17 THE COURT: Is there anything else  
18 you want to read?

19 MR. BEZANSON: Let me just check at  
20 the table for a moment.

21 (Pause.)

22 MR. BEZANSON: Yes. I'd like to  
23 continue on through the next page to 81, line nine.

24 MR. INGE: I object, your Honor.

1 THE COURT: I'll let you have through  
2 line four. That's a silly question, even though  
3 given by a distinguished lawyer who just walked in.  
4 I assume that's the same Mr. Adams.

5 MR. INGE: It is.

6 MR. BEZANSON: Through line four it  
7 is.

8 THE COURT: Yes, line four.

9 MR. INGE: Thank you.

10 (End of side bar conference.)

11 MR. BEZANSON: This is a continuation  
12 of portions of Mrs. Nagle's deposition.

13 "Q. The question was; what were some of the  
14 things you observed about George?

15 "A. It's just that there comes a time when you  
16 know that people are grown up and they are on their  
17 own, that's all.

18 "Q. That time comes at different times with  
19 different people, doesn't it?

20 "A. Yes, it does. I think it does.

21 "Q. And George, I think you told us it came  
22 about when he was nineteen?

23 "A. I don't know how old he was. I don't know  
24 if he was nineteen. I can't pinpoint that down.

1           "Q. But, at any rate, you did determine at some  
2 point that George could make his own decisions?

3           "A. Of course."

4           MR. BEZANSON: Thank you, your Honor.

5           THE COURT: All right. What are we  
6 going to do next?

7           MR. NISSEN: Your Honor, if it please  
8 the Court, the Plaintiffs would like to read from  
9 the Surgeon General's report.

10           May we give the jury a minute to stretch,  
11 or should I just launch in? There's a lot of  
12 reading.

13           THE COURT: We've had the morning  
14 recess. Why don't you just launch in.

15           MR. NISSEN: Good morning, ladies and  
16 gentlemen. I'm Eric Nissen, one of Mrs. Kotler's  
17 lawyers.

18           I'd like to read some more to you. Now  
19 we're reading from the Silver Anniversary Report of  
20 the Surgeon General, C. Everett Cooper. The title  
21 of this report, ladies and gentlemen, is reducing  
22 the health consequences of smoking, twenty-five  
23 years of progress, a report of the Surgeon General.

24           MR. LANE: We object to this reading



1 unless we at least have some identifying purposes  
2 for which it's being read. We would object to this  
3 being offered solely that anybody at American or  
4 anybody in the United States had this, this is the  
5 1989 edition.

6 THE COURT: I don't know for what  
7 purpose it's being read. The document was  
8 identified yesterday and to a lesser extent today as  
9 a source which was relied on by people in the  
10 profession of pulmonary diseases. I suppose if the  
11 question of relevance comes up.

12 Can you indicate to counsel what portions  
13 of the report you intend to read?

14 MR. LANE: We've had no indication.

15 MR. NISSEN: No, your Honor, I was of  
16 the understanding we could read based on Doctor  
17 Mark's --

18 THE COURT: I suppose you're limited  
19 to relevance, aren't you?

20 MR. NISSEN: Yes, your Honor.

21 THE COURT: Let's see what you intend  
22 to do.

23 (Side bar conference.)

24 MR. NISSEN: Your Honor, I wanted to

1 read briefly from the preface, describe it, giving  
2 them some background (handing).

3 MR. LANE: We have no objection to  
4 the preface.

5 MR. SHEFFLER: No.

6 MR. NISSEN: Three paragraphs. They  
7 have no objection.

8 THE COURT: I'll let you have the  
9 first two.

10 Then what do you want to do?

11 MR. NISSEN: Then, your Honor, the  
12 historical perspective which also relates exactly in  
13 point to what Doctor Mark was testifying about.  
14 Historical perspective.

15 MR. SHEFFLER: What page is that,  
16 Eric?

17 MR. NISSEN: Page five.

18 MR. LANE: What paragraph?

19 MR. NISSEN: First two paragraphs.

20 THE COURT: Okay.

21 MR. LANE: We object to that.

22 MR. SHEFFLER: We object to that,  
23 your Honor. Doctor Mark in yesterday's examination  
24 by Ms. Lumsden identified the Surgeon General's

1 report as one of the documents he used for his  
2 pathological testimony. He later said that one of  
3 the documents he used were the historical  
4 perspective and review of the bibliography for  
5 articles was the 1964 Surgeon General's report. I  
6 don't think there has been anything described in  
7 that report by Doctor Mark.

8 THE COURT: I think that's right.  
9 But he's identified the document. I'll allow it.

10 MR. SHEFFLER: Your Honor, if I may,  
11 just one last word on that.

12 If Doctor Mark identified portions that  
13 related to the pathology, is it that portion that's  
14 deemed --

15 THE COURT: I don't think he did. I  
16 think this is questionable.

17 Maybe you're inviting me to commit error  
18 here, but as I recall the testimony I think he  
19 blessed the whole document.

20 MR. LANE: I have a memory and, of  
21 course, I'll check the record, he said he used it to  
22 form medical opinions and judgments.

23 MS. LUMSDEN: I know the question I  
24 asked the doctor, if it will help.

1 MR. SHEFFLER: It's the answer that's  
2 important.

3 MS. LUMSDEN: I asked him if this was  
4 a reference book that was generally relied on from  
5 time to time in the medical and scientific  
6 community, and I held up that particular volume and  
7 he said yes.

8 THE COURT: That's what I remember.

9 MR. LANE: I understood that from  
10 medical and science, but not for history.

11 THE COURT: Well, there was no cross  
12 examination on the subject, so I will let those two  
13 in.

14 MR. SHEFFLER: The cross examination,  
15 your Honor, if I may did deal solely with the '64  
16 Surgeon General's report.

17 THE COURT: That's all right. You  
18 had the right to cross examine on any subject you  
19 wanted.

20 MR. SHEFFLER: The direct examination  
21 was limited to the use of the report for medical and  
22 scientific.

23 THE COURT: What's the next thing?  
24 I'm going to let it in.

1 MR. NISSEN: This page, page eleven,  
2 conclusions, major conclusions, major conclusions.

3 MR. BEZANSON: Your Honor, I have a  
4 further objection to these portions to the '89  
5 Surgeon General's report, and that is because it's  
6 25 some odd years after the relevant time period in  
7 this suit. It could very easily put the wrong  
8 perspective on this case.

9 As Doctor Mark said yesterday, you can  
10 look at x-rays in retrospect differently than the  
11 way you look at them at present.

12 THE COURT: That's not the issue  
13 here.

14 MR. BEZANSON: I think the 25 year --

15 THE COURT: It refers back. Now,  
16 what's this?

17 MR. NISSEN: This is talking about  
18 further comments about cigarettes, smoking.

19 MR. LANE: This is not information  
20 that would have been known to American in 1950 or  
21 1964. This is current data.

22 MR. SHEFFLER: Cerebral vascular  
23 disease is stroke.

24 THE COURT: All this is current.

1 I'll exclude page twelve.

2 MR. LANE: I think it's also true for  
3 page eleven.

4 THE COURT: Page eleven talks about  
5 the changes between '65 and '87, and I think that  
6 may be material on the question of the efficacy of  
7 warnings.

8 MR. LANE: I think that's true for  
9 number one and two, your Honor, but number three --

10 MR. SHEFFLER: Number four deals with  
11 1987 and deals with females.

12 THE COURT: Which are not relevant.

13 MR. SHEFFLER: Number five doesn't  
14 seem to be relevant to this.

15 MR. INGE: I think the  
16 epidemiological evidence is important in that the  
17 link we are trying to establish between lung cancer  
18 and smoking is proven by the increase in lung cancer  
19 among women, and smoking among women.

20 MR. LANE: With all due respect, the  
21 only issue is what's the cause of Mr. George  
22 Kotler's death, and you've had two doctor's here to  
23 testify to that, with the possibility of another one  
24 coming over.

1 THE COURT: I think if the Plaintiff,  
2 if the Plaintiff wants to reduce the jury to a  
3 comatose state by reading this stuff over and over  
4 again, I can't stop them.

5 MR. LANE: I just don't want the  
6 inference drawn that all of these findings were to  
7 be construed as something that was start of the art  
8 or state of mind of American in 1950 or 1960. That  
9 they use it today as data to create some kind of a  
10 standard or test is highly prejudicial. This is  
11 not --

12 MR. BEZANSON: Whatever point they  
13 are trying to make --

14 THE COURT: You can have items one,  
15 two and three on page eleven. Skip page twelve.

16 Do you want anything on page thirteen? I  
17 see a mark on it.

18 MR. NISSEN: Yes, here (indicating).  
19 I want you to read this part.

20 THE COURT: I see that it's marked.  
21 No, that's not relevant. I exclude page thirteen.

22 Now what do you want?

23 Aren't these cute little cards.

24 MR. NISSEN: That's all I could

1 find.

2 I have this marked here.

3 MS. LUMSDEN: If you want to let the  
4 jury stand, at least when we are over here.

5 THE COURT: Members of the jury, do  
6 you want to stand while we gum this stuff to death  
7 over here?

8 MR. SHEFFLER: What do you want to  
9 read on this page?

10 THE COURT: This is the kind of thing  
11 that they were talking about in the BU case.

12 MR. NISSEN: Look at the bottom here.

13 MR. SHEFFLER: The only relevant  
14 thing on there is the paragraph before it talking  
15 about what the 1964 report said, which is the report  
16 that's at issue.

17 MR. NISSEN: I'll read the whole  
18 thing then.

19 THE COURT: I think you'd have to  
20 read --

21 MR. NISSEN: The whole thing.

22 THE COURT: Yes. I'll let you read  
23 through paragraph four.

24 MR. SHEFFLER: We would like



1 paragraph eight read as well.

2 THE COURT: Okay. Read paragraph  
3 eight, too.

4 MR. NISSEN: Okay. Your Honor, the  
5 addiction to smoking page, page 78 and 79, starting  
6 here with this paragraph (indicating).

7 MR. SHEFFLER: We have no problem  
8 with the first sentence, your Honor, but fifteen  
9 years later and twenty years later --

10 MR. NISSEN: That's the issue of  
11 causation.

12 THE COURT: That goes to the question  
13 not of the duty to warn, but that goes to the  
14 question of the man's capacity to make a choice, I  
15 suppose.

16 MR. LANE: But he could have four  
17 psychological experts.

18 MR. SHEFFLER: I believe that's true,  
19 but isn't that psychological, psychiatric testimony,  
20 and shouldn't that portion of this document be  
21 blessed by the people who use that? Certainly  
22 Doctor Mark was not talking about psychology.

23 THE COURT: I don't know that you can  
24 separate out in this context. They are all dealing

1 with the same problem.

2 Okay. You have page 78.

3 MR. NISSEN: And 79.

4 MR. SHEFFLER: What part of 79?

5 MR. NISSEN: The whole thing.

6 THE COURT: Do you really want to do  
7 this? I mean you've got to be out of your mind.

8 MR. SHEFFLER: I like the stuff about  
9 the --

10 THE COURT: You're really going to  
11 sweep them away with this stuff.

12 MR. NISSEN: Well --

13 THE COURT: Go ahead, read it.

14 Anything else?

15 MR. NISSEN: Just a few more. I  
16 think this will take up, if I could find it, the  
17 page.

18 THE COURT: You're not going to read  
19 them a table.

20 MR. NISSEN: No, I'm going to read  
21 the major --

22 MR. BEZANSON: What page are you on?

23 MR. NISSEN: The major constituents  
24 of the vapor phase of the mainstream of nonfilter

1 cigarettes, and just read some of the --

2 MR. BEZANSON: Your Honor, I note an  
3 objection to that, because there is no relevance.  
4 Plaintiff's experts don't make anything of the  
5 constituents. They just talk about tobacco.

6 THE COURT: Doctor Mark is the common  
7 issue. It's going to confuse everyone.

8 MR. SHEFFLER: The problem is the  
9 table continues on the next page as well.

10 MR. NISSEN: I'll read the whole  
11 thing.

12 THE COURT: No, no. You'll read none  
13 of it.

14 MR. NISSEN: There's a chart that has  
15 tumorigenic agents, tumorigenic agents in tobacco and  
16 tobacco smoke.

17 MR. BEZANSON: Plaintiff's expert has  
18 already testified --

19 THE COURT: Your expert has testified  
20 that no one agent --

21 MR. NISSEN: There's a combination,  
22 your Honor. This goes also to the issue of --

23 THE COURT: This is razmataz. I'm  
24 going to exclude it.

1 MR. NISSEN: Objection.

2 THE COURT: Your objection is noted.

3 MR. NISSEN: May I just say we'll  
4 also prove de bene that Doctor Benowitz would be  
5 talking about the toxic constituents of the smoke,  
6 and that this is in the Surgeon General's report?

7 THE COURT: You put it in, but I  
8 think it's simply confusing at this stage of the  
9 case. If he puts the testimony in, if you've got a  
10 doctor to put the testimony in to give it some  
11 significance, fine. Right now the components  
12 according to the testimony don't have any  
13 significance.

14 MR. NISSEN: I believe Doctor Mark  
15 said the constituents of smoke in general, and these  
16 are the constituents. I would like to read it to  
17 the jury.

18 THE COURT: That's not going to help  
19 the jury decide this case.

20 MR. NISSEN: I think there's some  
21 issue also of warning. Doctor Benowitz will be  
22 talking about the fact that --

23 MR. SHEFFLER: Doctor Benowitz is  
24 not --

1 MR. NISSEN: He's a toxicologist,  
2 pharmacologist who will talk about the constituents  
3 and is equally available to know the constituents of  
4 the smoke, reading each one of the constituents,  
5 what's the particular use for? It's the knowledge  
6 of the effect of the combination.

7 MR. SHEFFLER: Which Doctor Benowitz  
8 doesn't address in his testimony nor in his expert  
9 report.

10 MR. INGE: It's not additives.

11 THE COURT: I understand that.

12 MR. NISSEN: I think the jury is  
13 entitled to know about the formaldehyde, arsenic.

14 THE COURT: We're not running this  
15 case, I might point out to you, as a public  
16 education program.

17 MR. NISSEN: I understand, your  
18 Honor.

19 THE COURT: This is a controversy  
20 between two parties which must be resolved.  
21 Professor Dershowitz notwithstanding.

22 MR. NISSEN: Respectfully we would  
23 submit that the tumorigenic as found in the Silver  
24 Anniversary Surgeon General reports are relevant and

1 something George Kotler should have been told about.

2 MR. BEZANSON: They are not relevant.

3 THE COURT: Not applicable,  
4 inadequate, sufficient, sufficient, not applicable,  
5 sufficient.

6 Unless you're going to get into all of  
7 this and describe it all, I think it ought to be  
8 described by some expert. I don't think you can  
9 just throw this stuff in flat to the jury without  
10 explanation. I just don't think it's going to be  
11 helpful.

12 MR. NISSEN: All right. Your Honor,  
13 can I read the paragraph about nicotine?

14 MR. LANE: Page?

15 THE COURT: This is on page 93.

16 MR. LANE: It's not a heart disease  
17 case.

18 MR. SHEFFLER: This is the one on  
19 pharmacology that Doctor Benowitz is supposed to  
20 come address.

21 MR. LANE: It's not a toxicological  
22 case.

23 THE COURT: Well, I'll let you have  
24 this last paragraph starting "as discussed

1 earlier." I don't want to get into the effect on  
2 heart disease.

3 MR. NISSEN: Your Honor, may we  
4 reserve the right to ask again should the testimony  
5 fit in this context?

6 THE COURT: You can always ask. But  
7 right now I think you ought to start right here.

8 MR. NISSEN: I have about fifteen,  
9 twenty minutes, is that all right?

10 THE COURT: That will be about all  
11 anybody can tolerate.

12 MR. NISSEN: Your Honor, may I note  
13 my objection to those portions you excluded and  
14 reserve the right to read that?

15 THE COURT: Sure.

16 (End of side bar conference.)

17 MR. NISSEN: Your Honor, I'm afraid I  
18 didn't note every single portion that you cleared  
19 for me, so I will --

20 THE COURT: I'm sure counsel will  
21 remind you.

22 MR. NISSEN: I'm sure they will.

23 MR. LANE: Give us advance warning,  
24 Mr. Nissen.

1 MR. NISSEN: Starting with the  
2 preface, page whatever, three.

3 "Exactly 25 years ago, on January 11th,  
4 1964, Luther L. Terry, MD, Surgeon General of the US  
5 Public Health Service, released the report of the  
6 Surgeon General's Advisory Committee on Smoking and  
7 Health. That landmark document, now referred to as  
8 the first Surgeon General's Report on Smoking and  
9 Health, was America's first widely publicized  
10 official recognition that cigarette smoking is a  
11 cause of cancer and other serious diseases.

12 "On the basis of more than 7,000 articles  
13 relating to smoking and disease already available at  
14 that time in the biomedical literature, the Advisory  
15 Committee concluded that cigarette smoking is a  
16 cause of lung cancer and laryngeal cancer in men, a  
17 probable cause of lung cancer in women, and the most  
18 important cause of chronic bronchitis. The  
19 Committee stated that "Cigarette smoking is a health  
20 hazard of sufficient importance in the United States  
21 to warrant appropriate remedial action."

22 Page V. At the upper top under blue  
23 collar workers --

24 MR. SHEFFLER: We didn't address



1 this. You hadn't identified those.

2 MR. NISSEN: I ask to read that  
3 paragraph under blue collar worker.

4 THE COURT: Any objection?

5 MR. SHEFFLER: Yes, your Honor.

6 MR. LANE: Yes, your Honor.

7 MR. NISSEN: I'll hold that, your  
8 Honor, and come back to it.

9 THE COURT: All right.

10 MR. NISSEN: Page five. Ladies and  
11 gentlemen, historical perspective.

12 "Each of the last five Surgeons General of  
13 the US Public Health Service (PHS) has identified  
14 cigarette smoking as one of this Nations most  
15 significant sources of death and disease. Today,  
16 more than one out of every six American deaths is  
17 the result of cigarette smoking. Smoking is  
18 responsible for an estimated 30 percent of all  
19 cancer deaths, including 87 percent of lung cancer,  
20 the leading cause of cancer mortality; 21 percent of  
21 deaths from coronary artery disease; eighteen  
22 percent of stroke deaths; and 82 percent of deaths  
23 from chronic obstructive pulmonary disease."

24 I don't recall if we went through the next

1 paragraph.

2 "Other forms of tobacco use, including pipe  
3 and cigar smoking and use of smokeless tobacco, are  
4 also associated with significantly elevated risks of  
5 disease and death.

6 "Although the health hazards of tobacco use  
7 have been suspected for almost 400 years, the first  
8 reported clinical impressions of a relationship  
9 between tobacco and disease date from the 18th  
10 Century, when tobacco use was associated with lip  
11 cancer and nasal cancer. However, true scientific  
12 understanding of the health effects of tobacco has  
13 been achieved only in the present century. Broders  
14 (1920) published an article in the Journal of the  
15 American Medical Association linking tobacco use to  
16 lip cancer, and eight years later, Lombard and  
17 Doering (1928) published an article in the New  
18 England Journal of Medicine noting that heavy  
19 smoking was more common among cancer patients than  
20 among control groups. Later, Pearl (1938) observed  
21 in the Journal of Science that heavy smokers had a  
22 shorter life expectancy than non-smokers."

23 Over to page eleven, major conclusions.

24 Number one. "The prevalence of smoking

1 among adults decreased from 40 percent in 1965 to 29  
2 percent in 1987. Nearly half of all living adults  
3 who smoked have quit."

4 MR. LANE: I think you left out a  
5 word. "Who ever smoked."

6 MR. NISSEN: "Nearly half of all  
7 living adults who ever smoked have quit."

8 Number two. "Between 1964 and 1985,  
9 approximately three-quarters of a million  
10 smoking-related deaths were avoided or postponed as  
11 a result of decisions to quit smoking or not to  
12 start. Each of these avoided or postponed deaths  
13 represented an average gain in life expectancy of  
14 two decades."

15 Was it number three?

16 MR. SHEFFLER: Number three.

17 MR. NISSEN: "The prevalence of  
18 smoking remains higher among blacks, blue-collar  
19 workers, and less educated persons than in the  
20 overall population. The decline in smoking has been  
21 substantially slower among women than among men."

22 Page thirteen.

23 MR. LANE: That was excluded.

24 THE COURT: Page thirteen was totally

1 excluded.

2 MR. NISSEN: Page 28.

3 MR. SHEFFLER: We haven't talked  
4 about this one.

5 MR. NISSEN: I would suggest  
6 paragraphs two and five.

7 MR. SHEFFLER: Why don't you go on  
8 with something else.

9 MR. NISSEN: Page 37, "these criteria  
10 were applied throughout the 1964 Report. When the  
11 word 'cause' was used in the 1964 Report, it was  
12 felt to convey 'the notion of a significant,  
13 effectual relationship between an agent and an  
14 associated disorder or disease in the host.' Use of  
15 the word 'cause' in relation to cigarette smoking  
16 did not exclude other agents as causes; rather, the  
17 members of the Advisory Committee shared 'a common  
18 conception of the multiple etiology of biological  
19 processes.' .

20 "The principle findings on health effects  
21 of smoking were summarized in the Surgeon General's  
22 1964 Report as follows:

23 "Cigarette smoking is associated with a  
24 70-percent increase in age-specific death rates of

1 men.

2 "Cigarette smoking is causally related to  
3 lung cancer in men; the magnitude of the effect of  
4 cigarette smoking far outweighs all other factors.  
5 The data for women, the less extensive, point in the  
6 same direction.

7 "Cigarette smoking is the most important of  
8 the causes of chronic bronchitis in the United  
9 States and increases the risk of dying from chronic  
10 bronchitis --

11 MR. LANE: If your Honor please,  
12 there may be a misunderstanding. I thought he was  
13 going to read number one and two, and number eight  
14 was specified.

15 THE COURT: Number eight was next.

16 MR. NISSEN: I thought I got to read  
17 to number four.

18 Number four talks about chronic  
19 bronchitis and emphysema, and emphysema is an issue  
20 in the case.

21 THE COURT: It is not established as  
22 a cause of death. That's all right. Go through  
23 number four and then go to number eight.

24 MR. NISSEN: "Cigarette smoking is

1 the most important of the causes of chronic  
2 bronchitis in the United States and increases the  
3 risk of dying from chronic bronchitis and  
4 emphysema. A relationship exists between cigarette  
5 smoking and emphysema, but it has not been  
6 established that the relationship is causal.

7 "It is established that male --

8 MR. SHEFFLER: Objection, your  
9 Honor. Number four was not part of the agreement.  
10 What Mr. Nissen was referring as four he read was  
11 three. Number four relates to coronary disease.

12 THE COURT: Right. Stop.

13 MR. NISSEN: Again relating to the  
14 1964 --

15 THE COURT: You've got number eight.

16 MR. NISSEN: Yes. This would be from  
17 the '64 report.

18 "The habitual use of tobacco is related  
19 primarily to psychological and social drives,  
20 reinforced and perpetuated by the pharmacologic  
21 actions of nicotine.

22 "Since 1967, the US Department --

23 MR. SHEFFLER: Objection.

24 MR. LANE: We only agreed to number

1 eight. That was the end of the reading.

2 MR. SHEFFLER: This is a new  
3 paragraph.

4 THE COURT: Just number eight.

5 MR. NISSEN: Page 78, Addiction To  
6 Smoking.

7 "The 1964 Surgeon General's Report referred  
8 to tobacco use as habituating. Fifteen years later,  
9 the 1979 Report concluded that smoking was 'the  
10 prototypical substance abuse dependency.' The  
11 entire 1988 Report was dedicated to an exhaustive  
12 review of tobacco use as an addiction. The 1988  
13 Report concluded:

14 "One, cigarettes and other forms of tobacco  
15 are addicting.

16 "Two, nicotine is the drug in tobacco that  
17 causes addiction.

18 "Three, the pharmacologic and behavioral  
19 processes that determine tobacco addiction are  
20 similar to those that determine addiction to drugs  
21 such as heroin or Cocaine.

22 "These findings are discussed in greater  
23 detail in part II of Chapter 5 on determinants of  
24 smoking behavior."

1 Part II, The Physiochemical Nature Of  
2 Tobacco.

3 MR. LANE: We didn't -- maybe my  
4 memory is off, your Honor. I don't believe we  
5 agreed to anything beyond that on page 79.

6 THE COURT: I think I permitted those  
7 paragraphs, but not the tables.

8 MR. NISSEN: I thought your Honor  
9 said that as far as the constituents of the  
10 tumorigenic tables that we could read if we read them  
11 all.

12 THE COURT: No. I said you can't  
13 read them all.

14 MR. NISSEN: I'm sorry?

15 THE COURT: If you get into reading  
16 them all, it becomes entirely too complex to deal  
17 with without expert guidance, so I've excluded the  
18 tables.

19 You can have those introductory paragraphs  
20 if you think they'll do any good, but not the  
21 tables. The tables require some expert testimony to  
22 tell us what they really mean.

23 MR. SHEFFLER: What page are you on?

24 MR. NISSEN: Page 79. Your Honor, I



1 would suggest then that where Doctor Benowitz will  
2 be testifying early next week that we would not  
3 impose on the jury or read from this portion now and  
4 proffer that before your Honor --

5 THE COURT: Sure, with the expert to  
6 tell us what it's about, bald and undigested  
7 unexplained information is not going to be helpful.

8 Are you going to stop there?

9 MR. NISSEN: Yes, your Honor.

10 THE COURT: Okay. Well, that almost  
11 takes up the day. I guess you plan to go from 9:00  
12 to 1:00 tomorrow?

13 MS. LUMSDEN: Yes, your Honor, I  
14 believe it wouldn't go beyond that.

15 THE COURT: Will we have a witness  
16 tomorrow?

17 MS. LUMSDEN: Yes.

18 THE COURT: Tomorrow morning, 9:00  
19 o'clock. I hope you have decent weather to travel  
20 in.

21 THE CLERK: All rise. Court is now  
22 adjourned.

23 THE COURT: Plaintiff's counsel, I  
24 have a memo from the Defendants concerning the

1 application of the Death Act, whether the terms of  
2 the present Wrongful Death Act apply to this case or  
3 whether the Wrongful Death Act as it existed in 1965  
4 was the one that applies, and it would be helpful if  
5 you could furnish me with a memorandum on the  
6 point. I will conduct some investigation myself,  
7 but one hopes for a little assistance from counsel.

8 MS. LUMSDEN: So there's some  
9 question as to whether the date of death is the date  
10 that applies as far as which statute?

11 THE COURT: Well, the point -- have  
12 you received this memo? I got it. I assumed you  
13 did.

14 MS. LUMSDEN: I haven't seen it.

15 MR. NISSEN: With the barrage of  
16 memos, we may well have.

17 THE COURT: The point that is made is  
18 that the last wrongful act of the Defendants, that  
19 is failing to provide a warning, occurred as of  
20 December 31st, 1965, and since that was the wrongful  
21 act, does the Wrongful Death Statute apply to that  
22 wrongful act or does the present Wrongful Death Act  
23 or the one that was in force upon the death of Mr.  
24 Kotler the one that applies. I don't recall having

1 had to deal with that issue in the past.

2 The Defendants don't cite very much  
3 authority, but any assistance that you wish to give  
4 me I will certainly receive with gratitude,  
5 otherwise I'll have to wrestle with it on my own.  
6 I'll have to do that anyway, but I'd hoped for some  
7 help.

8 Okay. Thank you.

9 (Whereupon, the trial was adjourned at  
10 12:45 o'clock p.m.)  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

C E R T I F I C A T E

I, Maureen C. O'Connor, Shorthand Reporter, do hereby certify that the foregoing transcript, Volume 4, is a true and accurate transcription of my stenographic notes taken on February 15, 1990.

---

Maureen C. O'Connor  
Shorthand Reporter

- - - - -